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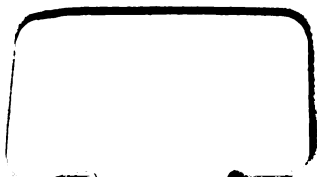
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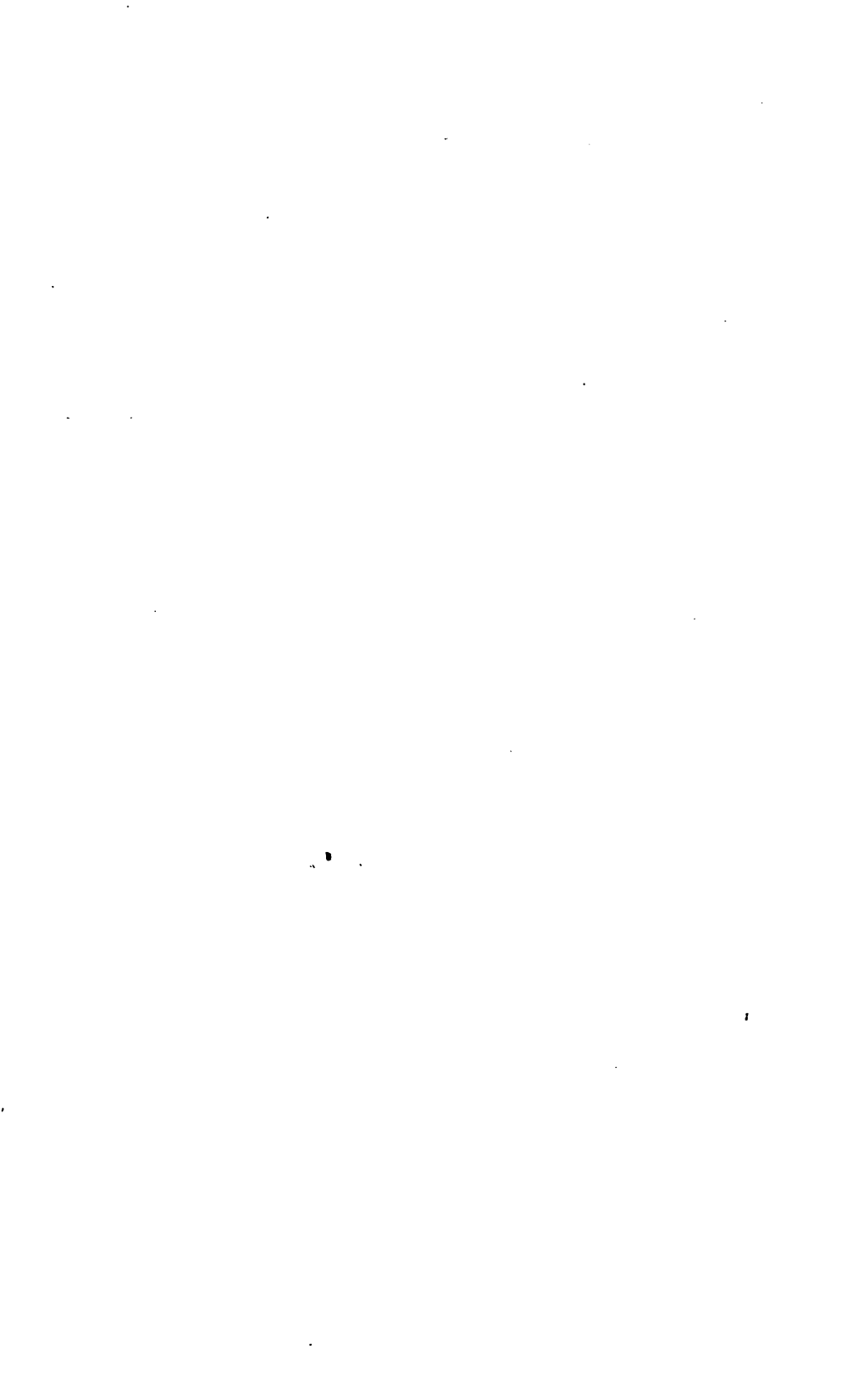
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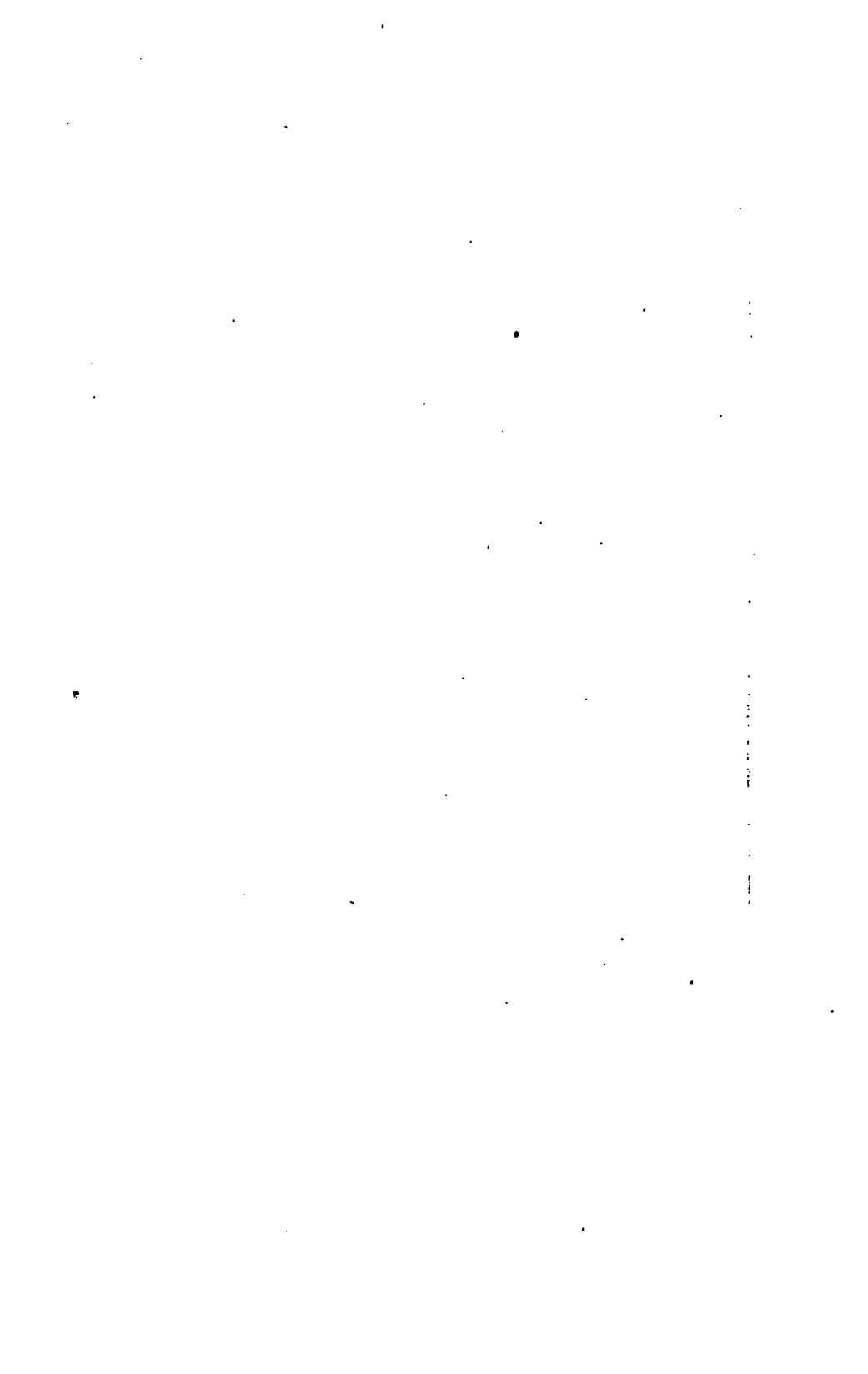


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REPORTS OF CASES

DETERMINED IN THE

APPELLATE COURTS

OF ILLINOIS

**WITH A DIRECTORY OF THE JUDICIARY OF THE STATE
CORRECTED TO MARCH 1, 1917, AND ABSTRACTS OF
CASES AS DESIGNATED BY THE COURTS
UNDER ACT APPROVED JUNE 27, 1913,
IN EFFECT JULY 1, 1913.**

VOL. CCV

A. D. 1918.

LAST FILING DATE OF REPORTED CASES:
FIRST DISTRICT, MAY 29, 1917.
SECOND DISTRICT, MAY 17, 1917.
THIRD DISTRICT, MAY 1, 1917.

EDITED BY
THE PUBLISHERS' EDITORIAL STAFF

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CALLAGHAN & COMPANY
1918

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MAR 14 1918

DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS.

CORRECTED TO MARCH 1, 1917.

The judiciary department of the State of Illinois is composed of (1) the Supreme Court; (2) Appellate Courts; (3) Circuit Courts; (4) Courts of Cook County; (5) City Courts; (6) Municipal Court of Chicago; (7) County and Probate Courts.

(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mount Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one, comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

SAMUEL P. IRWIN.....Bloomington.

JUSTICES.

First District—WARREN W. DUNCAN.....Marion.
Second District—WILLIAM M. FARMER.....Vandalia.
Third District—FRANK K. DUNN.....Charleston.
Fourth District—GEORGE A. COOKE.....Aledo.
Fifth District—CHARLES C. CRAIG.....Galesburg.
Sixth District—JAMES H. CARTWRIGHT.....Oregon.
Seventh District—ORRIN N. CARTER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Carter is the present Chief Justice.

CLERK.

CHARLES W. VAIL, Chicago.

LIBRARIAN.

RALPH H. WILKIN, Springfield.

(2) APPELLATE COURTS.

These Courts are held by the Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One clerk is elected in each district.

REPORTERS.

Reported by the publishers' editorial staff.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—James S. McInerney, Michigan Blvd. Bldg., Chicago.

JESSE HOLDOM, Presiding Justice, Michigan Blvd. Bldg., Chicago.

WM. H. MCSURELY, Justice, Michigan Blvd. Bldg., Chicago.

WILLIAM E. DEVER, Justice, Michigan Blvd. Bldg., Chicago.

FIRST BRANCH*

ALBERT C. BARNES, Presiding Justice, Michigan Blvd. Bldg., Chicago.

DAVID F. MATCHETT, Justice, Michigan Blvd. Bldg., Chicago.

CHARLES A. McDONALD, Justice, Michigan Blvd. Bldg., Chicago.

SECOND BRANCH**

THOMAS TAYLOR, Presiding Justice, Michigan Blvd. Bldg., Chicago.

JOHN M. O'CONNOR, Justice, Michigan Blvd. Bldg., Chicago.

CHARLES M. THOMSON, Justice, Michigan Blvd. Bldg., Chicago.

SECOND DISTRICT.

Composed of the counties of Boone, Bureau, Carroll, DeKalb, DuPage, Grundy, Henderson, Henry, Iroquois, Jo Daviess, Kane, Kankakee, Kendall, Knox, Lake, La Salle, Lee, Livingston, Marshall, McHenry, Mercer, Ogle, Peoria, Putnam, Rock Island, Stark, Stephenson, Warren, Whiteside, Will, Winnebago and Woodford.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

CLERK—Christopher C. Duffy, Ottawa.

JOHN M. NIEHAUS, Presiding Justice, Peoria.

DUANE J. CARNES, Justice, Sycamore.

DORRANCE DIBELL, Justice, Joliet.

THIRD DISTRICT.

Composed of the counties of Adams, Brown, Calhoun, Cass, Champaign, Christian, Clark, Coles, Cumberland, DeWitt, Douglas, Edgar, Ford, Fulton, Greene, Hancock, Jersey, Logan, Macon, Macoupin, Mason, McDonough, McLean, Menard, Montgomery, Morgan, Moultrie, Platt, Pike, Sangamon, Schuyler, Scott, Shelby, Tazewell and Vermillion.

Court sits at Springfield, Sangamon county, on the first Tuesdays in April and October.

CLERK—George L. Tipton, Springfield.

GEORGE W. THOMPSON, Presiding Justice, Galesburg.

EMERY C. GRAVES, Justice, Geneseo.

EDGAR ELDREDGE, Justice, Ottawa.

* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statutes, 1897, 508, Laws of 1897, 135, J. & A. 1 2981.

** Established under act of June 6, 1911, J. & A. 1 2989.

FOURTH DISTRICT.

Composed of the counties of Alexander, Bond, Clay, Clinton, Crawford, Edwards, Effingham, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson, Johnson, Lawrence, Madison, Marion, Massac, Monroe, Perry, Pope, Pulaski, Randolph, Richland, Saline, St. Clair, Union, Wabash, Washington, Wayne, White and Williamson.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in March and October.

CLERK—Charles C. Johnson, Mount Vernon.

JAMES C. MCBRIDE, Presiding Justice, Taylorville.

HARRY HIGBEE, Justice, Pittsfield.

FRANK H. BOGGS, Justice, Urbana.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into seventeen judicial circuits, as follows:*

FIRST CIRCUIT.

The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

Judges: A. W. LEWIS, Harrisburg.

DEWITT T. HARTWELL, Marion.

WILLIAM N. BUTLER, Cairo.

SECOND CIRCUIT.

The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

Judges: J. C. EAGLETON, Robinson.

JULIUS C. KERN, Carmi.

CHARLES H. MILLER, Benton.

THIRD CIRCUIT.

The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

Judges: LOUIS BERNREUTER, Nashville.

GEORGE A. CROW, East St. Louis.

J. F. GILLHAM, Edwardsville.

FOURTH CIRCUIT.

The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

Judges: WM. B. WRIGHT, Effingham.

JAMES C. MCBRIDE, Taylorville.

THOMAS M. JETT, Hillsboro.

FIFTH CIRCUIT.

The counties of Vermillion, Edgar, Clark, Cumberland and Coles.

Judges: JOHN H. MARSHALL, Charleston.

WALTER BREWER, Toledo.

AUGUSTUS A. PARTLOW, Danville.

* Laws 1897, 188, J. & A. § 8070.

SIXTH CIRCUIT.

The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Piatt.

Judges: GEO. A. SENTEL, Sullivan.
WM. K. WHITFIELD, Decatur.
FRANKLIN H. BOGGS, Urbana.

SEVENTH CIRCUIT.

The counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey.

Judges: FRANK W. BURTON, Carlinville.
NORMAN L. JONES, Carrollton.
ELBERT F. SMITH, Springfield.

EIGHTH CIRCUIT.

The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

Judges: HARRY HIGBEE, Pittsfield.
ALBERT AKERS, Quincy.
GUY R. WILLIAMS, Havana.

NINTH CIRCUIT.

The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

Judges: GEORGE W. THOMPSON, Galesburg.
HARRY M. WAGGONER, Macomb.
ROBERT J. GRIER, Monmouth.

TENTH CIRCUIT.

The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

Judges: JOHN M. NIEHAUS, Peoria.
THEODORE N. GREEN, Pekin.
CLYDE E. STONE, Peoria.

ELEVENTH CIRCUIT.

The counties of McLean, Livingston, Logan, Ford and Woodford.

Judges: SAIN WELTY, Bloomington.
GEORGE W. PATTON, Pontiac.
THOMAS M. HARRIS, Lincoln.

TWELFTH CIRCUIT.

The counties of Will, Kankakee and Iroquois.

Judges: DORRANCE DIBELL, Joliet.
FRANK L. HOOPER, Watseka.
ARTHUR W. DESELM, Kankakee.

THIRTEENTH CIRCUIT.

The counties of Bureau, La Salle and Grundy.

Judges: SAMUEL C. STOUGH, Morris.
JOE A. DAVIS, Princeton.
EDGAR ELDREDGE, Ottawa.

FOURTEENTH CIRCUIT.

The counties of Rock Island, Mercer, Whiteside and Henry.

Judges: FRANK D. RAMSAY, Morrison.

EMERY C. GRAVES, Geneseo.

WILLIAM T. CHURCH, Alledo.

FIFTEENTH CIRCUIT.

The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

Judges: JAMES S. BAUME, Galena.

RICHARD S. FARRAND, Dixon.

OSCAR E. HEARD, Freeport.

SIXTEENTH CIRCUIT.

The counties of Kane, Du Page, De Kalb and Kendall.

Judges: CLINTON F. IRWIN, Elgin.

DUANE J. CARNES, Sycamore.

MAZZINI SLUSSER, Wheaton.

SEVENTEENTH CIRCUIT.

The counties of Winnebago, Boone, McHenry and Lake.

Judges: ARTHUR H. FROST, Rockford.

CHARLES H. DONNELLY, Woodstock.

CLAIRE C. EDWARDS, Waukegan.

(4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit Court in criminal and quasi-criminal cases only, and the judges of the Circuit and Superior Courts are judges, ex officio, of the Criminal Court.

CRIMINAL COURT.

CLERK—Frank J. Walsh, Criminal Court Building, Chicago.

CIRCUIT COURT.

CLERK—August W. Miller, County Building, Chicago.

JUDGES.

VICTOR P. ARNOLD,
JESSE A. BALDWIN,
GEORGE F. BARRETT,
DAVID M. BROTHERS,
ROBERT E. CROWE,
JESSE HOLDOM,
FRANK JOHNSTON, JR.,
GEORGE KERSTEN,
JOHN P. MCGOORTY,
DAVID F. MATCHETT,

MERRITT W. PINCKNEY,
KICKHAM SCANLAN,
FREDERICK A. SMITH,
THOMAS TAYLOR, JR.,
CHARLES M. THOMSON,
OSCAR M. TORRISON,
RICHARD S. TUTHILL,
CHARLES M. WALKER,
THOMAS G. WINDES,
ANTON T. ZEMAN,

SUPERIOR COURT.

CLERK—JOHN KJELLANDER, County, Building, Chicago.

JUDGES.

ALBERT C. BARNES,
THEODORE BRENTANO,
WILLIAM FENIMORE COOPER,
JOSEPH B. DAVID,
WILLIAM E. DEVER,
JOSEPH H. FITCH,
CHARLES M. FOELL,
MARTIN M. GRIDLEY,
HENRY GUERIN,
OSCAR HEREL,

JACOB H. HOPKINS,
MARCUS A. KAVANAGH,
CHARLES A. McDONALD,
MICHAEL L. MCKINLEY,
WILLIAM H. MCSURELY,
JOHN M. O'CONNOR,
HUGO PAM,
JOSEPH SARATH,
DENIS E. SULLIVAN,
JOHN J. SULLIVAN.

(5) CITY COURTS.

City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 37, R. S., J. & A. ¶ 3309, and when so established have jurisdiction as defined by Sec. 1 of an act entitled "An Act in relation to courts of record in cities," approved May 10, 1901, J. & A. ¶ 3289.

THE CITY COURT OF ALTON.

L. D. YAGER, Judge.

ALLAN G. MACDONALD, Clerk.

THE CITY COURT OF AURORA.

EDWARD M. MANGAN, Judge.

J. W. GREENAWAY, Clerk.

THE CITY COURT OF BEARDSTOWN.

J. J. COOKE, Judge.

JOHN LISTMANN, Clerk.

THE CITY COURT OF BENTON.

R. E. HICKMAN, Judge.

LORAN MORGAN, Clerk.

THE CITY COURT OF CANTON.

HARRY C. MORAN, Judge.

A. C. SHEPLEY, Clerk.

THE CITY COURT OF CARBONDALE.

HERBERT A. HAYS, Judge.

DALLAS MEISENHEIMER, Clerk.

THE CITY COURT OF CENTRALIA.

ALBERT D. RODENBERG, Judge.

GUY C. LIVESAY, Clerk.

THE CITY COURT OF CHARLESTON.

CHARLES A. QUACKENBUSH, Judge.

CORA DANIELS, Clerk.

THE CITY COURT OF CHICAGO HEIGHTS.

CHARLES H. BOWLES, Judge.

EDWARD H. KIRKIS, Clerk.

THE CITY COURT OF DE KALB.

HARRY W. McEWEN, Judge.

JOHN C. KILLIAN, Clerk.

THE CITY COURT OF DU QUOIN.

BENJAMIN W. POPE, Judge.

HARRY BARRETT, Clerk.

THE CITY COURT OF EAST ST. LOUIS.

H. L. BROWNING,

W. M. VANDEVENTER, Judges.

WILLIAM J. VEACH, Clerk.

THE CITY COURT OF ELGIN.

FRANK E. SHOPEN, Judge.

CHARLES S. MOTE, Clerk.

THE CITY COURT OF GRANITE CITY.

M. R. SULLIVAN, Judge.

A. N. HOMAN, Clerk.

THE CITY COURT OF HARRISBURG.

W. W. DAMEON, Judge. HOMER WADE, Clerk.

THE CITY COURT OF HERRIN.

ROBERT T. COOK, Judge. ANNA REED, Clerk.

THE CITY COURT OF JOHNSTON CITY.

J. H. CLAYTON, Judge. J. E. SULLINS, Clerk.

THE CITY COURT OF KEWANEE.

H. STEELING POMEROY, Judge. CHARLES L. ROWLEY, Clerk.

THE CITY COURT OF LITCHFIELD.

DAN W. MADDOX, Judge. MRS. LAURETTA SALZMANN, Clerk.

THE CITY COURT OF MACOMB.

JOSIE WESTFALL, Judge. WM. B. MARTIN, Clerk.

THE CITY COURT OF MARION.

W. O. POTTER, Judge. GEO. T. CARTER, Clerk.

THE CITY COURT OF MATTOON.

JOHN McNUTT, Judge. THOMAS M. LITTLE, Clerk.

THE CITY COURT OF MOLINE.

G. O. DIETZ, Judge. GEORGE A. SCHRAEDER, Clerk.

THE CITY COURT OF PANA.

J. H. FORNOFF, Judge. G. W. MARSLAND, Clerk.

THE CITY COURT OF SPRING VALLEY.

WILLIAM H. HAWTHORNE, Judge. PETER ROLANDE, Clerk.

THE CITY COURT OF STERLING.

CARL E. SHELDON, Judge. EARL L. HESS, Clerk.

THE CITY COURT OF WEST FRANKFORT.

H. R. DIAL, Judge. PEARL BEATTIE, Clerk.

THE CITY COURT OF ZION CITY.

V. V. BARNES, Judge. O. L. SPRECHER, Clerk.

(6) MUNICIPAL COURT OF CHICAGO.

Established by Act of May 18, 1905 (L. 1905, p. 158), J. & A. § 3313 *et seq.*

FRANK P. DANISCH, Clerk.

CHIEF JUSTICE,

HARRY OLSON.

ASSOCIATE JUDGES.

BERNARD P. BARASA,	CHARLES N. GOODNOW,	JOSEPH P. RAFFERTY,
JOHN R. CAVERLY,	FRANK H. GRAHAM,	JOHN RICHARDSON,
WELLS M. COOK,	JOHN F. HAAS,	JOHN STELE,
JOHN COURTNEY,	HOWARD HAYES,	HUGH R. STEWART,
HARRY P. DOLAN,	EDMUND K. JARECKI,	DENNIS W. SULLIVAN,
JAMES DONAHOE,	HUGH J. KEARNS,	JOHN A. SWANSON,
LEO DOYLE,	JOSEPH S. LABUY,	SAMUEL H. TRUDE,
HARRY M. FISHER,	JOHN A. MAHONEY,	JOSEPH Z. UHLIR,
SHERIDAN E. FRY,	JOHN R. NEWCOMER,	EDWARD T. WADE,
WILLIAM N. GEMMILL,	JOHN K. PRINDIVILLE,	HOSKA W. WELLS.

(7) COUNTY AND PROBATE COURTS.

In the counties of Cook, Kane, LaSalle, Madison, Peoria, Rock Island, Sangamon, St. Clair, Vermillion and Will, each having a population of over 70,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate. (Laws 1881, 72), J. & A. ¶ 3259.

JUDGES	COUNTIES	COUNTY SEATS
LYMAN MCCARL.....	Adams.....	Quincy.
MILES FREDERICK GILBERT.....	Alexander.....	Cairo.
WM. H. DAWDY.....	Bond.....	Greenville.
WM. C. DE WOLF.....	Boone.....	Belvidere.
WILLARD Y. BAKER.....	Brown.....	Mt. Sterling.
JAMES R. PEICHARD.....	Bureau.....	Princeton.
JOHN DAY, JR.....	Calhoun.....	Hardin.
ARTHUR J. GRAY.....	Carroll.....	Mt. Carroll.
CHARLES Æ. MARTIN.....	Cass.....	Virginia.
ROY C. FREEMAN.....	Champaign.....	Urbana.
CHARLES A. PRATER.....	Christian.....	Taylorville.
A. L. RUFFNER.....	Clark.....	Marshall.
JOHN L. BOYLES.....	Clay.....	Louisville.
JAMES ALLEN.....	Clinton.....	Carlyle.
JOHN P. HARRAH.....	Coles.....	Charleston.
THOMAS F. SCULLY.....	Cook.....	Chicago.
HENRY HORNER, PRO. J.....	Cook.....	Chicago.
DUANE GAINES.....	Crawford.....	Robinson.
STEPHEN B. RARIDEN.....	Cumberland.....	Toledo.
WILLIAM L. POND.....	DeKalb.....	Sycamore.
FREDERICK C. HILL.....	DeWitt.....	Clinton.
D. H. WAMSLEY.....	Douglas.....	Tuscola.
S. L. RATHJE.....	DuPage.....	Wheaton.
DANIEL V. DAYTON.....	Edgar.....	Paris.
PETER C. WALTERS.....	Edwards.....	Albion.
BARNEY OVERBECK.....	Effingham.....	Effingham.
JEROME G. WILLS.....	Fayette.....	Vandalia.
MALCOLM L. MCQUISTON.....	Ford.....	Paxton.
NEALY I. GLENN.....	Franklin.....	Benton.
HOBART S. BOYD.....	Fulton.....	Lewistown.
GEORGE L. HOUSTON.....	Gallatin.....	Shawneetown.
THOMAS HENSHAW.....	Greene.....	Carrollton.
GEORGE BEDFORD.....	Grundy.....	Morris.
J. S. SNEED.....	Hamilton.....	McLeansboro.
E. W. DUNHAM.....	Hancock.....	Carthage.
ARTHUR A. MILES.....	Hardin.....	Elizabethtown.
RUFUS F. ROBINSON.....	Henderson.....	Oquawka.
LEONARD E. TELLEN.....	Henry.....	Cambridge.
JOHN H. GILLAN.....	Iroquois.....	Watseka.
WILLARD F. ELLIS.....	Jackson.....	Murphysboro.
HARRY C. DAVIDSON.....	Jasper.....	Newton.
ANDREW D. WEBB.....	Jefferson.....	Mt. Vernon.
HARRY W. POGUE*.....	Jersey.....	Jerseyville.
F. J. CAMPBELL.....	Jo Daviess.....	Galena.
J. F. HIGHT.....	Johnson.....	Vienna.
S. N. HOOVER.....	Kane.....	Geneva.
JOHN H. WILLIAMS, PRO. J.....	Kane.....	Geneva.
JAY H. MERRILL.....	Kankakee.....	Kankakee.
CLARENCE S. WILLIAMS.....	Kendall.....	Yorkville.
R. C. RICE.....	Knox.....	Galesburg.
PERRY L. PERSONS.....	Lake.....	Waukegan.
HENRY MAYO.....	La Salle.....	Ottawa.

* Died November 21. 191*

JUDGES	COUNTIES	COUNTY SEATS
ALBERT T. LARDIN, Pro. J.	La Salle	Ottawa.
O. W. LONGENECKER	Lawrence	Lawrenceville.
JOHN B. CRABTREE	Lee	Dixon.
B. R. THOMPSON	Livingston	Pontiac.
CHARLES J. GEHLBACH	Logan	Lincoln.
CHARLES I. IMES	McDonough	Macomb.
DAVID T. SMILEY	McHenry	Woodstock.
JAMES C. RILEY	McLean	Bloomington.
JOHN H. MCCOY	Macon	Decatur.
ANDREW J. DUGGAN	Macoupin	Carlinville.
H. B. EATON	Madison	Edwardsville.
GEO. W. CROSSMANN, Pro. J.	Madison	Edwardsville.
WILLIAM G. WILSON	Marion	Salem.
DANIEL H. GREGG	Marshall	Lacon.
JAMES A. MCCOMAS	Mason	Havana.
LANNES P. OAKES	Massac	Metropolis.
JESSE M. OTT	Menard	Petersburg.
FRIEND L. CHURCH	Mercer	Aledo.
HENRY SCHNEIDER	Monroe	Waterloo.
T. J. McDAVID	Montgomery	Hillsboro.
WM. E. THOMSON	Morgan	Jacksonville.
JOHN T. GRIDER	Moultrie	Sullivan.
FRANK E. REED	Ogle	Oregon.
CHESTER F. BARNETT	Peoria	Peoria.
WALTER A. CLINCH, Pro. J.	Peoria	Peoria.
LOUIS R. KELLY	Perry	Pinckneyville.
WM. A. DOSS	Piatt	Monticello.
PAUL F. GROTE	Pike	Pittsfield.
B. F. ANDERSON	Pope	Golconda.
FRED HOOD	Pulaski	Mound City.
IRVING E. BROADDUS	Putnam	Hennepin.
WM. M. SCHUWERK	Randolph	Chester.
ROBT. B. WITCHER	Richland	Olney.
NELS A. LARSON	Rock Island	Rock Island.
BENJ. S. BELL, Pro. J.	Rock Island	Rock Island.
JOSEPH B. MESSICK	St. Clair	Belleville.
FRANK PERRIN, Pro. J.	St. Clair	Belleville.
CHAS. D. STILWELL	Saline	Harrisburg.
JOHN B. WEAVER	Sangamon	Springfield.
C. H. JENKINS, Pro. J.	Sangamon	Springfield.
JOHN C. WORK	Schuyler	Rushville.
F. C. FUNK	Scott	Winchester.
A. J. STEDLEY	Shelby	Shelbyville.
FRANK THOMAS	Stark	Toulon.
ROSCOE J. CARNAHAN	Stephenson	Freeport.
JAMES M. RAHN	Tazewell	Pekin.
MONROE C. CRAWFORD	Union	Jonesboro.
LAWRENCE T. ALLEN	Vermillion	Danville.
W. J. BOOKWALTER, Pro. J.	Vermillion	Danville.
W. S. WILLHITE	Wabash	Mt. Carmel.
L. E. MURPHY	Warren	Monmouth.
W. P. GREEN	Washington	Nashville.
J. V. HEIDINGER	Wayne	Fairfield.
J. M. ENDICOTT	White	Carmi.
WM. A. BLODGETT	Whiteside	Morrison.
GEORGE J. COWING	Will	Joliet.
JOHN B. FITHIAN, Pro. J.	Will	Joliet.
W. F. SLATER	Williamson	Marion.
LOUIS M. RECKHOW	Winnebago	Rockford.
ARTHUR C. FORT	Woodford	Eureka.

CASES IN THIS VOLUME IN WHICH CERTIORARI HAS BEEN DENIED.

The following table shows the Appellate Court cases reported in this volume in which certiorari has been applied for and denied, thus making the opinion of the Appellate Court final. (See Practice Act, sec. 121, J. & A. ¶ 8658.)

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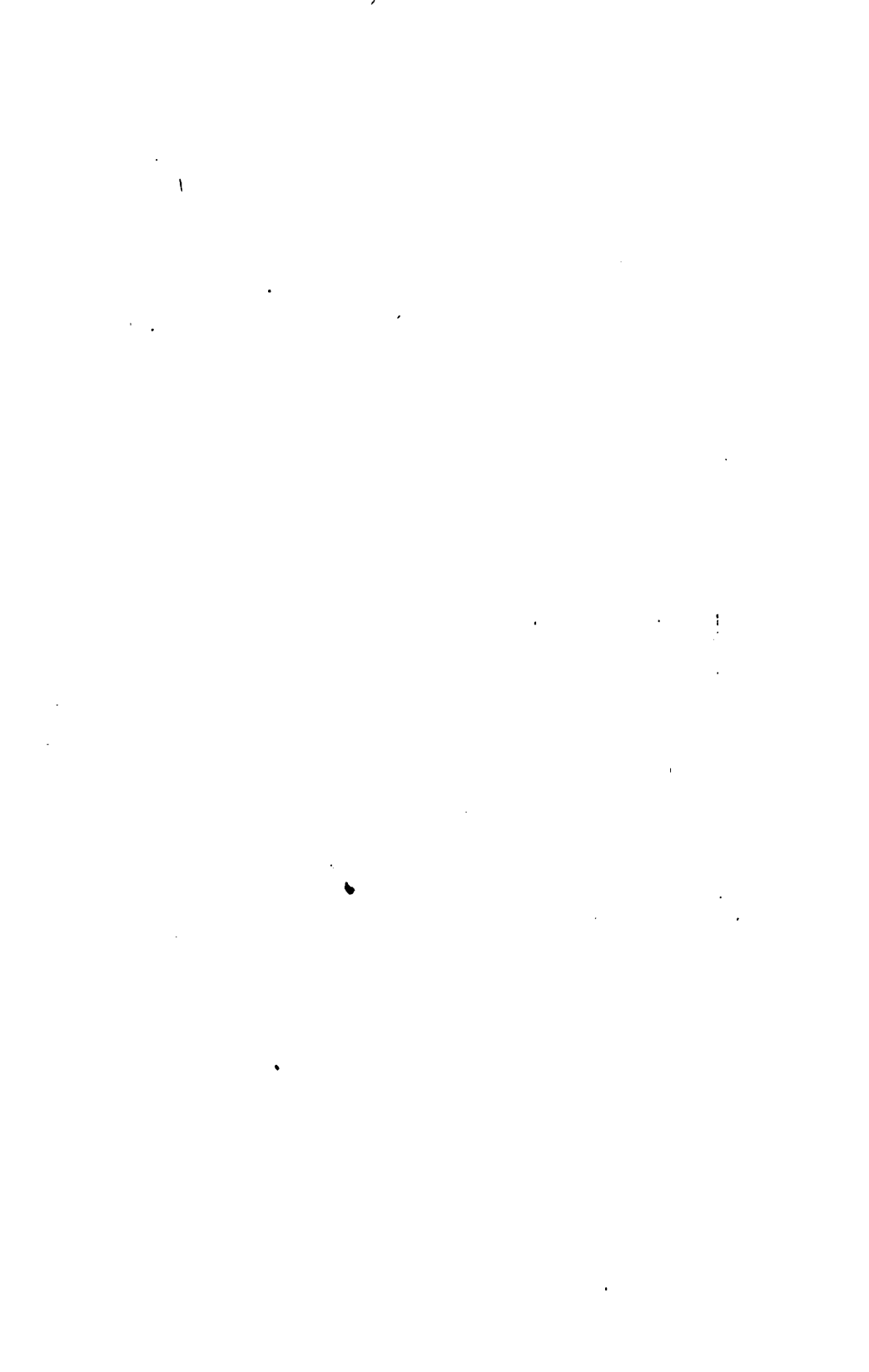


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CASES
DETERMINED IN THE
THIRD DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1917

J. A. Clark, Appellee, v. M. O. Lee, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Vermillion county; the Hon. JOHN H. MARSHALL, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded. Opinion filed April 16, 1917.

Statement of the Case.

Action by J. A. Clark, plaintiff, against M. O. Lee, defendant, for fraud and deceit in the sale by defendant to plaintiff of certain shares of capital stock of a corporation. From a judgment for plaintiff for \$1,500, defendant appeals.

DYER & DYER and **O. M. JONES**, for appellant.

ROBERT R. RODMAN, **WILLIAM M. ACTON** and **JAY BRIGGS**, for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Clark v. Lee, 205 Ill. App. 1.

Abstract of the Decision.

1. **EVIDENCE, § 300***—*when corporate books not identified so as to be admissible.* In an action for fraud and deceit in the sale of certain shares of capital stock of a corporation, where, for the purpose of proving that at the time the stock was sold to plaintiff it was worthless, the secretary of a trust company which had been appointed receiver for the corporation whose stock was in question, produced in evidence certain books which he testified had been sent, with others not produced, by express to the clerk of the court by the president of the corporation and by the clerk delivered to the witness, and that he did not himself know that the books produced were the books of the corporation, *held* that there was no identification of the books produced as the books of the corporation, and that they were incompetent.

2. **SALES**—*when evidence insufficient to show ownership by corporation of premises on which factory was built in action for fraud in sale of stock.* In an action for fraud and deceit in the sale of certain shares of capital stock of a corporation, where, for the purpose of proving that at the time the stock was sold to plaintiff the corporation did not own or have a deed of the property on which its factory was located, under an allegation in the declaration that the defendant had falsely represented that the corporation did then have a deed for said property, the secretary of a trust company which had been appointed receiver for the corporation produced in evidence a certain lease by the corporation as lessee of said property which he testified had been sent with other papers and books by the president of the corporation to the clerk of the court and had been delivered by the clerk to the witness, who did not know whether the buildings of the corporation were erected upon the premises described in the lease, and there was no other evidence as to the ownership by the corporation of said premises, *held* that there was no competent evidence tending to prove such allegation of the declaration as to ownership by the corporation of the premises on which its factory was built.

3. **SALES**—*when declaration states good cause of action for fraud in sale of stock.* A declaration in an action for fraud and deceit in the sale by defendant to plaintiff of certain shares of capital stock of a corporation, based upon alleged false representations by the defendant, charging that defendant recklessly made the false representations as of his own knowledge without knowing whether they were true or false with intent to deceive and defraud plaintiff, *held* to state a good cause of action.

4. **INSTRUCTIONS, § 118***—*when erroneous as not conforming to evidence.* The giving of an instruction, in an action for fraud

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

City of LaHarpe v. Watts, 205 Ill. App. 3.

and deceit in the sale of certain shares of capital stock based upon alleged false representations as to the value of such shares, stating a correct proposition of law in regard to when the value of stock may be a material fact, *held* erroneous for the reason there was no competent evidence on the question of such value.

5. INSTRUCTIONS, § 75*—*when erroneous as assuming facts.* In an action for fraud and deceit in the sale of certain shares of capital stock based upon certain alleged false representations by the defendant, an instruction which assumed that defendant's representations were false and fraudulent, *held* to be erroneous.

6. SALES, § 419*—*when instruction erroneous in action for fraud in sale of stock.* In an action for fraud and deceit in the sale of certain shares of capital stock based upon certain alleged false representations by the defendant, an instruction attempting to set out what representations were material and enumerating among others certain statements by the defendant as to value of the stock and ownership by the corporation of certain property of which there was no competent evidence, *held* to be erroneous.

7. APPEAL AND ERROR, § 1300*—*when presumed that leading questions were of no importance.* Where objection was made in argument that the court erred in permitting leading questions which were not presented in the brief and no reference to the abstract where such questions might be found was made, *held* that it would be assumed such questions were of no importance.

City of LaHarpe, Appellee, v. George Watts, Sr.,
Appellant.

(Not to be reported in full.)

Appeal from the County Court of Hancock county; the Hon. E. W. DUNHAM, Judge, presiding. Heard in this court at the October term, 1916. Reversed. Opinion filed April 16, 1917.

Statement of the Case.

Prosecution by the City of LaHarpe, plaintiff,
against George Watts, Sr., defendant, for violation of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

City of LaHarpe v. Watts, 205 Ill. App. 3.

an ordinance of the plaintiff concerning dramshops, wholesale stores and the sale of intoxicating liquors. From a judgment of conviction and adjudging defendant to pay one hundred and sixty dollars, defendant appeals.

PLANTZ & LAMET and HARTZELL & CAVANAGH, for appellant.

C. W. WARNER and J. W. WILLIAMS, for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. INTOXICATING LIQUORS, § 17*—*when license ordinance invalid.* Ordinance No. 88 of the City of LaHarpe, providing that when the city council should elect to grant a license to keep a dramshop or to sell intoxicating liquors the council should at the time of granting such license determine and fix the amount of the fee to be paid, etc., *held* void in not definitely fixing the amount of such fee.

2. INTOXICATING LIQUORS, § 40*—*validity of license issued under void ordinance.* A dramshop license issued under a city ordinance which is void affords no protection to the holder of it.

3. INTOXICATING LIQUORS, § 17*—*when license ordinance suspended.* A city ordinance for the licensing of dramshops passed prior to the time the city became anti-saloon territory, *held* to be suspended during the time such city remained anti-saloon territory, under J. & A. ¶ 4644, providing that ordinances for the restriction, regulation or prohibition of the sale of intoxicating liquors, so far as inconsistent with the status of such territory as anti-saloon territory, shall be suspended during the time it remains such territory.

4. INTOXICATING LIQUORS—*when no conviction may be had for violation of suspended license ordinance.* No conviction may be had for violation of a city ordinance for the licensing of dramshops while such ordinance stands suspended, under J. & A. ¶ 4644, providing that ordinances for the restriction, regulation or prohibition of the sale of intoxicating liquors, so far as inconsistent with the status of territory as anti-saloon territory, shall be suspended during the time such territory remains anti-saloon territory.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Gones v. Illinois Printing Co., 205 Ill. App. 5.

5. INTOXICATING LIQUORS—*when prosecution should be in name of People of State.* Where intoxicating liquors were sold in anti-saloon territory in a city whose ordinances provided for the licensing of dramshops and for a penalty for selling such liquors without having such license, *held* that a prosecution for selling such liquors should be in the name of the People of the State under the law by which the anti-saloon territory was created and not in the name of the city under such ordinances.

**C. B. Gones, Appellee, v. Illinois Printing Company
et al., Appellants.**

(Not to be reported in full.)

Appeal from the Circuit Court of Vermillion county; the Hon. AUGUSTUS A. PARTLOW, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded. Opinion filed April 16, 1917.

Statement of the Case.

Action by C. B. Gones, plaintiff, against Illinois Printing Company, a corporation, J. G. Fisher and Newton Shields, defendants, to recover damages for personal injuries sustained by being run into by an automobile belonging to defendant Fisher. From a judgment for plaintiff for \$5,000, defendants appeal.

RALPH M. JINKINS and JOHN H. LEWMAN, for appellants.

WALTER T. GUNN and THOMAS A. GRAHAM, for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Gones v. Illinois Printing Co., 205 Ill. App. 5.

Abstract of the Decision.

1. CORPORATIONS, § 310*—*when declaration in action against servant of corporation for negligence in erecting fence in street insufficient.* In an action to recover damages for personal injuries against several defendants where the only allegation in the declaration as to one defendant was that another defendant, a corporation, had "by and through its servant [said first defendant] erected and maintained" a certain fence in a street which it was alleged had prevented plaintiff from avoiding the third defendant's automobile which ran into plaintiff and injured him, *held* that such declaration did not charge the first defendant personally with any negligence and failed to state a cause of action against him.

2. MUNICIPAL CORPORATIONS, § 896*—*what are rights of public in street.* While the public has a paramount right to the use of a public street, this right is not absolute but relative.

3. MUNICIPAL CORPORATIONS, § 917*—*what does not constitute an obstruction of street.* In the improvement, erection or repair of buildings and the construction of drains and sewers therefor or of other adjuncts, the placing of building materials in the street preparatory to building on the land is not unlawfully obstructing the street.

4. MUNICIPAL CORPORATIONS, § 1038*—*what is nature of need authorizing placing of building material on street.* The necessity of using a public street for the placing of building material preparatory to improving, erecting or repairing buildings or drains or sewers therefor need not be an absolute but it is sufficient if it be a reasonable one.

5. MUNICIPAL CORPORATIONS, § 1038*—*when leaving of building materials on street not wrongful obstruction.* In an action to recover damages for personal injuries sustained by plaintiff being run into by the automobile of one defendant, which it was alleged plaintiff was unable to avoid because of a certain fence erected by another defendant in the street under a permit from the city to enable such defendant to place building material preparatory to building, the fact that the limit of time fixed in the permit for the obstruction had expired when the accident happened, *held* not to make such obstruction wrongful, as it was one which such defendant had the right to make without a permit, no ordinance or facts being pleaded showing any such permit was required.

6. MUNICIPAL CORPORATIONS, § 1038*—*when fence in street not proximate cause of injury to bicycle rider by automobile.* In an action to recover damages for personal injuries sustained by plaintiff being run into by the automobile of one defendant which it was

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Wallace v. Citizens' State Bank, 205 Ill. App. 7.

alleged plaintiff could not avoid because of a certain fence erected by another defendant in the street under a permit from the city for building purposes, where the plaintiff as he was going on his bicycle towards a street intersection where the fence was located could see the automobile two hundred feet away on the cross street and the automobile was proceeding down the middle of the street and plaintiff was struck by it when he was four or five feet beyond the fence, *held* that the fence was not shown to be the proximate cause of the injury.

7. MUNICIPAL CORPORATIONS, § 1038*—*when existence of fence in street after expiration of building permit not proximate cause of injury to bicycle rider by automobile.* Where a fence was erected in the street under a permit for building purposes, the fact that the time limit fixed in it had expired does not make the fence the proximate cause of an injury sustained by a party riding a bicycle being struck by an automobile on an intersecting street where such fence was located, as he was attempting to cross such intersecting street.

8. JUDGMENT, § 200*—*when judgment against several defendants jointly reversed as to all.* A judgment against several defendants jointly, in an action to recover damages for personal injuries, against one of whom no cause of action was set up in the declaration, must be reversed as to all.

**J. H. Wallace et al., Appellees, v. Citizens' State Bank
of Windsor et al., Appellants.**

(Not to be reported in full.)

Appeal from the Circuit Court of Shelby county; the Hon. THOMAS M. JETT, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Bill for an injunction by J. H. Wallace, W. H. Ownby, J. A. Erwin, C. C. Firebaugh, and Ruth Wallace

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Wallace v. Citizens' State Bank, 205 Ill. App. 7.

Firebaugh, complainants, against the Citizens' State Bank of Windsor, Illinois, and the officers and stockholders of such bank, except complainant J. H. Wallace, defendants, to compel the transfer to complainant of certain shares of the capital stock of the defendant bank. From a decree, on demurrer to the bill, in favor of the complainants, defendants appeal.

VAUSE, HUGHES & KIGER and E. A. RICHARDSON, for appellants.

WHITAKER, WARD & PUGH, EDWARD C. CRAIG, DONALD B. CRAIG and JAMES W. CRAIG, JR., for appellees.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. CORPORATIONS, § 155*—*when transfer of stock valid as between parties.* As between the parties, a transfer of stock by delivery of the certificates with power of attorney or indorsed in blank passes title without transfer on the books of the company, even when the by-laws of the company provide to the contrary.

2. CORPORATIONS, § 153*—*when blank transfer of stock may be filled in with name of remote transferee.* A blank transfer of stock may be filled in with the name of a remote transferee whose name concerns only the purchaser of the stock.

3. CORPORATIONS, § 156*—*what is duty as to transfer of stock on books and issuance of certificates.* A bank is but the custodian of the shares of its capital stock, whose duty as such trustee it is to transfer on its books such shares to the owner of the actual title and issue to him certificates for the same.

4. CORPORATIONS, § 156*—*when duty to transfer stock and issue certificates enforceable in equity.* The duty of a bank to transfer on its books shares of its capital stock to the actual owners and to issue to him certificates for the same may be enforced in a court of equity.

5. EQUITY, § 146*—*when bill not multifarious.* Where a bill was filed by several complainants to compel the transfer of certain shares of the capital stock of the defendant bank, some to one com-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Wallace v. Citizens' State Bank, 205 Ill. App. 7.

plainant and some to others, based in part upon a single certificate in which all were interested, each owning a portion of the shares represented therein as transferee of the original holder of such certificate, *held* that such bill was not multifarious.

6. CORPORATIONS—*what is right of owner of certificate to have new and smaller certificates issued.* The owner of shares of capital stock represented by a single certificate has the right to surrender such certificate and have new certificates made out for smaller numbers of shares in the names of any one whom he sees fit.

7. CORPORATIONS, § 154*—*who may join in suit to compel transfer of shares of stock.* All owners of shares of capital stock represented by a single certificate may join in a suit to compel a proper transfer of such shares made upon the books of the company.

8. APPEAL AND ERROR, § 760*—*when affidavits not part of record not considered.* The Appellate Court will not take notice of affidavits filed to show whether an assignment of error was presented or called to the attention of the trial court, but must decide the question raised upon the record before it.

9. CORPORATIONS, § 154*—*when bill to compel transfer of corporate stock on books sufficiently avers that complainant is assignee.* Where the owner of certain shares of capital stock transferred and indorsed the certificate representing same to his daughter by her maiden name, and suit was brought by her in her married name, to compel transfer on the books of the corporation in which the bill alleged that such shares were so assigned and that such assignee was the owner's daughter, and exhibits attached to and made a part of the bill stated that by such assignment complainant became the owner of such shares, *held* that there was sufficient averment that complainant was such assignee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kitchen v. Weatherby, 205 Ill. App. 10.

**Marietta Kitchen, Appellant, v. George E. Weatherby,
Appellee.**

(Not to be reported in full.)

Appeal from the Circuit Court of Macon county; the Hon. WILLIAM K. WHITFIELD, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by Marietta Kitchen, plaintiff, against George E. Weatherby, defendant, to recover damages for personal injuries sustained by plaintiff in a collision between her automobile and defendant's car. From a judgment for defendant on a directed verdict, plaintiff appeals.

REDMON, HOGAN & REDMON, for appellant.

MILLS BROTHERS, for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. PARENT AND CHILD, § 39*—*liability of parent for torts of child.* A parent is not liable for the torts of a minor child.

2. PARENT AND CHILD, § 39*—*when evidence insufficient to show that child had permission to use automobile.* Evidence held insufficient to show that defendant's son had general permission from defendant to use defendant's automobile, in an action to recover damages for personal injuries sustained by plaintiff in a collision with defendant's automobile while it was being driven by defendant's son.

3. PARENT AND CHILD, § 39*—*when evidence insufficient to show liability of parent for negligence of son using father's automobile.* In an action to recover damages for personal injuries sustained by

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

City of Monticello v. Clodfelter, 205 Ill. App. 11.

plaintiff in a collision with defendant's automobile while it was being driven by defendant's son, where there was no evidence whether said son was a minor or an adult, or that the car was being used on defendant's business, or that the son had ever received defendant's permission to use the car, or was at the time of the accident using it with defendant's knowledge or consent or had ever so used it, *held* that the evidence was insufficient to show defendant's liability for the accident.

**City of Monticello, Appellee, v. Ira Clodfelter,
Appellant.**

(Not to be reported in full.)

Appeal from the County Court of Platt county; the Hon. W. A. Doss, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action in debt by the City of Monticello, plaintiff, against Ira Clodfelter, defendant, to recover for violation by defendant of an ordinance of plaintiff as to intoxicating liquors. From a judgment for plaintiff upon two counts, one for selling such liquors and one for keeping a place where such liquors were sold, and assessing a fine of fifty dollars upon each count, defendant appeals.

J. L. HICKS, for appellant.

F. M. SHONKWILER, for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Harrold v. Clinton Gas & Electric Co., 205 Ill. App. 12.

Abstract of the Decision.

1. INTOXICATING LIQUORS, § 62*—*when city has power to make ordinance regulating sale of.* A city located in territory which has become anti-saloon territory under the Local Option Act has power to make an ordinance prohibiting the sale of intoxicating liquor within the city not inconsistent with that act and providing for a violation of its provisions.

2. INTOXICATING LIQUORS, § 62*—*when ordinance prohibiting sale of is valid.* An ordinance of a city, located within anti-saloon territory, providing that any person selling intoxicating liquors within the city shall be fined not less nor more than certain amounts, and that any place where such liquors are sold or kept for sale shall be deemed a nuisance and the keeper of same fined not less nor more than certain amounts, *held* not to be inconsistent with the Local Option Act and a valid ordinance.

3. JURY, § 57a*—*when evidence insufficient to show incompetency of juror.* Evidence held insufficient to show that a certain juror was mentally unbalanced to such an extent as to make him incompetent to act as such.

Otto Harrold, by Amos Harrold, Appellee, v. Clinton Gas & Electric Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of De Witt county; the Hon. GEORGE A. SENTEL, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded. Opinion filed April 16, 1917.

Statement of the Case.

Action by Otto Harrold, a minor, by Amos Harrold, his next friend, plaintiff, against the Clinton Gas & Electric Company and the National Telephone & Electric Company, defendants, to recover damages for per-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Harrold v. Clinton Gas & Electric Co., 205 Ill. App. 12.

sonal injuries sustained by plaintiff from certain wires of the defendants in contact. From a judgment for plaintiff against the defendant Clinton Gas & Electric Company for \$1,250, and for the defendant National Telephone & Electric Company on a directed verdict, defendant Clinton Gas & Electric Company appeals.

L. W. INGHAM, HERRICK & HERRICK and F. K. LEMON, for appellant.

E. J. SWEENEY and L. O. WILLIAMS, for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. NEGLIGENCE, § 53*—*when contributory negligence of another no defense.* A defendant is liable when guilty of the negligence charged without regard to whether the negligence of another also contributed to the injury.

2. NEGLIGENCE, § 223*—*when instruction on liability where negligence of another contributes to injury, correct.* In an action to recover damages for personal injuries, an instruction that to recover in the case it must be shown by the greater weight of the testimony that the negligent act or omission of the defendant was the cause which produced the injury, if any, but that it need not have been the sole cause, and that it was sufficient if it concurred with some other cause acting at the same time which, in combination with it, caused the injury, or that it set in motion a chain of circumstances and operated on them in continuous sequence unbroken by any new or independent cause, held to be correct.

3. DAMAGES, § 213*—*when instruction in action for personal injuries not misleading.* In an action to recover damages for personal injuries, where an instruction was to the effect that in assessing damages, upon finding for the plaintiff, the jury had the right to consider the character and extent of such injuries, if any, which were proven by the evidence, the pain and suffering endured, if any were proven, and the permanent character of the injuries, if the evidence showed the plaintiff was permanently injured, held that there was nothing in such instruction nor in the evidence which could lead the jury to believe that they were authorized to assess damages for injury to plaintiff's earning power during his

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Harrold v. Clinton Gas & Electric Co., 205 Ill. App. 12.

minority and in the instruction to mislead the jury into assessing damages on account of plaintiff's nervous condition shown in the evidence, in view of the further instruction that such damages could not be allowed.

4. DAMAGES, § 206*—*when instruction erroneous as not conforming to evidence in action to recover for personal injuries.* In an action to recover damages for personal injuries, an instruction that the jury in assessing damages, on finding for the plaintiff, must estimate same from the facts and circumstances in proof and by considering them in connection with their knowledge, observation and experience in the ordinary affairs of life, *held* erroneous under a declaration alleging plaintiff had incurred expense of four hundred dollars in and about attempting to be cured where there was no evidence of any expense incurred by plaintiff but only that he had been treated by several physicians.

5. DAMAGES, § 189*—*necessity of proof of medical services.* Medical services are capable of definite proof and if recovery is sought therefor, in an action to recover damages for personal injuries, such proof must be made and the jury have no right to assess such damages from their own knowledge, observation and experience in the affairs of life.

6. DAMAGES, § 250*—*when excessive verdict cured by remittitur.* In an action to recover damages for personal injuries, *held* that any error of the jury in assessing a considerable portion of the damages under an erroneous instruction was curable by remittitur.

7. ELECTRICITY, § 26*—*when ordinance prohibiting entry on school grounds inadmissible in action against electric companies for negligent injuries.* In an action by a minor child against two electric companies to recover damages for personal injuries sustained by plaintiff from wires of defendants' in contact when he went, while at play in the street, upon certain school property to recover a ball which had bounced thereon, an ordinance of the city prohibiting any person from going upon property used for school purposes under a penalty, excepting those attending the school and others going on such property for the transaction of any lawful business, *held* to be properly excluded.

8. INFANTS, § 24*—*liability for crime.* A child eight years of age cannot be guilty of any crime or misdemeanor.

9. DAMAGES, § 133*—*when verdict excessive.* In an action by a child eight years of age to recover damages for personal injuries, where the injuries consisted only of some deformity of the first joint of one finger, some pain and suffering, and several scars on the body not visible when plaintiff was clothed, a verdict for \$1,250 *held* excessive to the extent of \$400.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Charles T. Stevenson et al., Appellants, v. Thomas W. Stevenson, Executor, Appellee.

1. **WILLS, § 383***—*when contingent estate in remainder created.* A clause in a will: "I desire that the following named nephews and nieces shall be paid the amounts herein designated, provided they are living at the time of the death of my wife," held to create a contingent estate in remainder in the nephews and nieces and not a vested estate in remainder.

2. **WILLS, § 495***—*when shares of deceased devisees go into residuary fund.* Under a will bequeathing certain amounts to certain persons, provided such persons are living at the time of the death of another person, held that if any of such devisees were not alive at the time of the death of the life tenant the shares designed for them would go into the residuary fund and pass to the residuary legatee.

3. **WILLS, § 468***—*what is effect of renunciation of will giving a life estate by widow.* The only effect of the renunciation by a widow of a will giving her a life estate in the testator's property on the funds of the estate would be to lessen the residuary estate by the amount of the property she took absolutely.

4. **WILLS, § 395***—*when postponed vested legacy accelerated.* A postponed vested legacy will be accelerated by the renunciation of the life estate which precedes it.

5. **WILLS, § 395***—*when contingent legacy or remainder accelerated.* A contingent legacy or remainder will not be accelerated by the renunciation of the life estate which precedes it unless such appears to have been the intention of the testator.

Appeal from the Circuit Court of McLean county; the Hon. COLSTON D. MYERS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 16, 1917.

M. A. BRENNAN and RALPH J. HEFFERNAN, for appellants.

BARRY & MORRISSEY, for appellee.

MR. JUSTICE GRAVES delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Stevenson v. Stevenson, 205 Ill. App. 15.

Appellants filed a bill in chancery asking for a construction of the will of one John C. Stevenson, deceased, and other relief. It appears from the bill that the will in question, omitting the formal parts, is as follows:

"1st. It is my will that all my just debts be paid.

"2nd. I do hereby give, bequeath and devise unto my wife Ella A. Stevenson, all of my estate, both real and personal.

"3rd. I do hereby appoint and constitute my wife, Ella A. Stevenson, executrix of this my last will and it is my will that no bond be required of her as executrix.

"4th. My executrix is hereby fully empowered to execute all deeds or other conveyances that may be necessary in order to pay my debts or settle my estate.

* * * * *

"Whereas: I, John C. Stevenson, did on the 21st day of December, 1882, make my last will and testament, I do now, by this writing add this codicil to my said will to be taken as a part thereof.

"First: I desire that all my just debts be paid.

"Second: I desire that the sum of One Thousand Dollars be paid to my brother, Adlai E. Stevenson.

"Third: I desire that all my remaining property, both real and personal, shall be held for the benefit of my wife, Ella A. Stevenson, and that all the income from said property shall be for her use and benefit so long as she shall live, and that any money on hands or in the bank at the time of my death, shall be given to her or used for her immediate wants.

"Fourth: On the death of my wife, I desire the sum of Three Hundred Dollars, to be set aside for the purchase of suitable markers or stones for the graves on the cemetery lot in which I am buried.

"Fifth: I also desire that the sum of Two Hundred Dollars be left in trust with the Peoples Bank of this city, the interest on which sum shall be used for the care of the cemetery lot.

"Sixth: I desire that the following named nephews and nieces shall be paid the amounts herein desig-

nated, provided they are living at the time of the death of my wife, viz.:

"To Charles T. Stevenson, the sum of Five Hundred Dollars.

"To James B. Stevenson, the sum of Five Hundred Dollars.

"To Ida Stevenson Hayes, the sum of Five Hundred Dollars.

"To Catherine McCaughey Brown, the sum of One Thousand Dollars.

"To Annie Stevenson Bullis, the sum of One Thousand Dollars.

"To Lettie McCaughey Snyder, the sum of Five Hundred Dollars.

"Seventh: I also will to Mrs. Anna M. Sweeney the sum of Five Hundred Dollars, provided she remains with my wife as nurse or attendant up to the time of Mrs. Stevenson's death.

"Eighth: All of the remaining portion of my estate, both real and personal, I will, bequeath and devise to my brother Thomas W. Stevenson, and appoint him at the time of my death in conjunction with my wife as executor of my estate without bond, with power to buy, sell or lease my property as they may deem best."

It further appears from the bill that Ella A. Stevenson renounced the provisions of the will and accepted certain property which was agreed upon by her and the representatives of the estate, in lieu of what was devised to her in said will.

The theory of the bill is that the effect of the renunciation by the widow of the provisions of the will is to accelerate the special bequests mentioned in the sixth clause of the codicil to the will.

Appellee demurred to the bill for the specific reasons following:

"1st: The renunciation of Ella A. Stevenson, the widow of John C. Stevenson, of the provision made for her by the third paragraph of the codicil and her receipt and acceptance of all the property that was due

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or coming to her under the statutory provision made for her in case of such renunciation, does not alter the time of payment of the legacies bequeathed in the sixth paragraph of the codicil.

"2nd: The legacies bequeathed by the sixth paragraph of said codicil are not payable until the happening of the contingency therein designated, and as such contingency has not come to pass, petitioners are not entitled to relief prayed for.

"3rd: The placing of the time of payment of the legacies at the death of Ella A. Stevenson was not made solely for the benefit of the wife of deceased, but also to protect the residuary legatee.

"4th: The will and codicil of John C. Stevenson are clear and unambiguous and express directly the intention of the testator in such a manner that they are not susceptible of more than one construction."

The demurrer was sustained, complainants elected to stand by their bill, which was thereupon dismissed for want of equity.

The determination of this case involves the construction of the sixth clause of the codicil to the will and the determination of the question whether the renunciation of the widow has accelerated the bequests to the persons named in that clause.

The construction of the clause mentioned requires a determination of whether the language employed in its opening paragraph, viz.: "I desire that the following named nephews and nieces shall be paid the amounts herein designated, provided they are living at the time of the death of my wife," creates contingent or vested legacies.

"A vested remainder is one which throughout its continuance gives to the remainderman or his heirs the right to the immediate possession, whenever and however the preceding estate is determined." *Lachenmyer v. Gehlbach*, 266 Ill. 11; *Carter v. Carter*, 234 Ill. 507.

A contingent remainder is one limited to take effect

either to an uncertain person or upon an uncertain event, but it is not always true that a remainder which is subject to a contingency is a contingent remainder. If the contingency upon which the remainder depends is a condition precedent, the remainder is contingent; if it is subsequent, the remainder is vested though the happening of the condition subsequent may divest it. *Hill v. Hill*, 264 Ill. 219.

The contingency in the will before us is: "Provided they are living at the time of the death of my wife."

Equivalent expressions have been held to create contingent estates in the following cases:

In *Starr v. Willoughby*, 218 Ill. 485, the bequest was to such of the children of the testator "as may be living at that time."

In *Cummings v. Hamilton*, 220 Ill. 480, the contingency was: "If he survives the life tenant."

In *Barr v. Gardner*, 259 Ill. 256, the bequest was to the testator's wife and at her death to his lineal heirs should there be any living, but, if not, then to the heirs of the testator's blood.

In *Haward v. Peavey*, 128 Ill. 430, the language considered to be sufficient to create a contingent estate was: "To such of them as shall be living."

The language referred to in the case at bar clearly creates a contingent estate in the nephews and nieces to whom specific bequests were given in the sixth clause of the codicil of the will, unless it be held that the postponement of these legacies was to let in the life estate of the widow created by the will. There is nothing in the will that would warrant such a holding. It is averred in the bill that the time fixed for the payment of the legacies mentioned in that clause was "solely for the benefit of the testator's widow."

That averment, however, is not an averment of fact but is merely a conclusion of the pleader, and its truth is not admitted by the demurrer. There is therefore in this record nothing from which the court could con-

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clude that the time fixed for the payment of these legacies was postponed for the benefit of the life tenant. On that state of record the clear and specific language of the will should prevail as against any naked presumptions that would result in defeating the manifest intention of the testator.

In *Barr v. Gardner*, 259 Ill. 256, the will created a life estate in favor of the wife of the testator for her maintenance and support with remainder over at her death to the testator's lineal heirs if there should be any living, and if not, then to the heirs of his blood, and the court said: "There was no present fixed right of future enjoyment in a determinate person or persons until the death of his wife, but the uncertainty was as to whether lineal heirs or heirs of the blood would take. The postponement was not for the purpose of letting in the life estate of the widow, but on account of the uncertainty as to whether there would be, at the death of the widow, living lineal heirs. The remainder was contingent because it was limited to take effect to dubious and uncertain persons."

The will before us creates a life estate in the widow of the testator, with specific bequests out of the remainder to certain named persons provided they are alive at the time of the death of the widow and life tenant. If those persons, or any of them to whom those bequests were made, were not alive at the time of the death of the life tenant, then the shares designed for them would under the law go into the residuary fund and pass to appellee, who is the residuary legatee. *Crerar v. Williams*, 145 Ill. 625; *Gilliland v. Bredin*, 63 Pa. St. 393. There was no present fixed right of future enjoyment in any determinate person until the death of the widow, in any of the sums of money so devised to the named nephews and nieces of the testator. It might go to the persons so named or it might go to appellee, the uncertainty being whether

any of the nephews and nieces named would be alive when the death of the life tenant occurred. The postponement was clearly not for the benefit of the life tenant, but was for the benefit of the residuary legatee whose legacy would be increased by death of any of the nephews and nieces named before the death of the wife of the testator. The legacies to the nephews and nieces were, under the rulings of the *Barr* case, *supra*, contingent and could not vest until the death of the life tenant.

The only effect the renunciation by the widow of the provisions of the will had on the disposition of the funds of the estate was to lessen by the amount of the property she took absolutely; the residuary estate under the will was to go to appellee. If she had not renounced, he would have received at her death all of the estate except that which was applied to the payment of the special bequests. Since she has renounced the will he will take all at her death of the estate except what is applied to the payment of the special bequests, and except that part which the widow takes absolutely. With that exception the property is distributed under the provisions of the will. *Marvin v. Ledwith*, 111 Ill. 144; *Dunshee v. Dunshee*, 251 Ill. 405; *Wakefield v. Wakefield*, 256 Ill. 296.

While a postponed vested legacy will be accelerated by the renunciation of the life estate which precedes it, *Northern Trust Co. v. Wheaton*, 249 Ill. 606, a contingent legacy or remainder will not be so accelerated unless it appears that such was the intention of the testator.

From anything that can be discovered from the record before us, the bill was properly dismissed.

The decree dismissing the bill is affirmed.

Decree affirmed.

Charles D. Rodgers, Defendant in Error, v. Orah B. Ridgley, Plaintiff in Error.

1. PLEADING, § 150*—*what was purpose of Legislature in passing act relating to affidavits of defense.* The purpose of the Legislature in passing in its present form section 55 of the Practice Act (J. & A. ¶ 8592), relating to affidavits of defense as to the whole or a portion of the plaintiff's demand, and providing that the plaintiff should have judgment for that portion of his demand to which no such affidavit should be filed and that the action should proceed as to the balance of such demand in dispute, was to narrow the issues to be tried and give notice to the plaintiff what defenses he must be prepared to meet.

2. PLEADING, § 153*—*what are requisites of affidavit of defense to portion of plaintiff's demand.* When a defense is presented, under section 55 of the Practice Act (J. & A. ¶ 8592), providing that where an affidavit of defense is made to a portion of the plaintiff's demand the action shall proceed as to such portion and that plaintiff shall be entitled to judgment, as by default for the balance of his demand, to only part of plaintiff's demand, that part must be set out so fully and precisely that the court can determine what amount is admitted to be due and render judgment therefor, and a trial be had as to the contested part of the demand.

3. PLEADING, § 153*—*when affidavit of defense insufficient.* Defendant's affidavit of defense held properly stricken from the files for insufficiency, as it did not purport to present a defense to plaintiff's entire demand or definitely state what part of the demand was admitted to be just and correct or state facts sufficiently for the court to determine what part of such demand was admitted to be due and what part contested.

Error to the Circuit Court of Platt county; the Hon. WILLIAM K. WHITFIELD, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed April 16, 1917.

CHARLES MANSFIELD, D. H. GLASS and WHITAKER,
WARD & PUGH, for plaintiff in error.

CHARLES C. LEFORGEE, WILLIAM G. MCGINLEY,
GEORGE W. BLACK and THOMAS W. SAMUELS, for de-
fendant in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same
vol and section number.

MR. JUSTICE GRAVES delivered the opinion of the court.

This suit was begun to the June term of the Circuit Court of Piatt county, 1915, by the defendant in error to recover of plaintiff in error on five promissory notes signed by her.

Defendant in error filed a declaration containing five special counts and the common counts; each special count declared on a separate note. With this declaration an affidavit of the claim was filed stating the total amount due on all the notes to be \$27,428.65.

After having filed numerous original and amended pleas, to all but one of which demurrer was sustained, and after filing two or more so-called affidavits of merits she confessed to be bad by taking leave to amend the same, plaintiff in error in December, 1915, filed still other original and amended pleas and a final amended affidavit of merits.

Because the last affidavit of merits as amended was considered insufficient, the court struck the same, and all pleas not already disposed of, from the files, and entered judgment in favor of defendant in error for the amount shown by the affidavit of claim to be due.

It is provided, among other things, by section 55 of the Practice Act of this State (J. & A. ¶ 8592), that: "If the plaintiff in any suit upon a contract, express or implied, for the payment of money, shall file with his declaration an affidavit showing the nature of his demand, and the amount due him from the defendant, after allowing to the defendant all his just credits, deductions and set-offs, if any, he shall be entitled to judgment, as in case of default, unless the defendant, or his agent or attorney, shall file with his plea an affidavit, stating that he verily believes the defendant has a good defense to said suit upon the merits to the whole or a portion of the plaintiff's demand, *and specifying the nature of such defense*, and if a portion

Rogers v. Ridgley, 205 Ill. App. 22.

specifying the amount * * *. *If the affidavit of defense is to only a portion of the plaintiff's demand, the plaintiff shall be entitled to a judgment for the balance of his demand, and the suit shall thereafter proceed as to the portion of the plaintiff's demand in dispute as if the suit had been brought therefor. * * **

The purpose of the Legislature in passing the section of the statute referred to in its present form was to narrow the issues to be tried and give notice to the plaintiff what defenses he must be prepared to meet. *Kadison v. Fortune Bros. Brewing Co.*, 163 Ill. App. 276; *Perry v. Krausz*, 166 Ill. App. 5. When a defense is presented to only part of the demand, that part must be set out so fully and precisely that the court can determine what amount is admitted to be due and render judgment therefor, and a trial be had as to the contested portion of the demand.

The affidavit that was stricken from the files does not meet the requirements of that section because it does not purport to present a defense to the entire demand, nor is it definitely stated therein what part of the demand is admitted to be just and correct. Neither are the facts averred sufficient to render it possible for a court to determine what part of the claim is admitted to be due and what part of it is contested.

The Circuit Court properly struck the pleas and affidavit from the files and rendered judgment as in cases of default.

The affidavit was insufficient in other respects and most, if not all, of the pleas were bad, but no useful purpose would be subserved by a discussion of those questions.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Trego v. Estate of Cunningham, 205 Ill. App. 25.

**Edward F. Trego, Trustee, Appellee, v. Estate of
James A. Cunningham, Deceased, Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of Vermillion county; the Hon. JOHN H. MARSHALL, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed April 16, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Claim by Edward F. Trego, trustee, for the use of William Moore and the estate of A. H. Trego, deceased, claimant, against the estate of James A. Cunningham, deceased, defendant, for contribution to approximately \$300,000 claimed to have been paid by William Moore and A. H. Trego in liquidation of certain notes on which they and James A. Cunningham and others were indorsers. From a judgment for claimant for \$113,490.67, defendant estate appeals.

For decisions on a former appeal, see *Trego v. Cunningham's Estate*, 267 Ill. 367, rev'g 188 Ill. App. 70.

DYER & DYER, LINDLEY, PENWELL & LINDLEY, W. M. ACTON and REARICK & MEEKS, for appellant.

H. M. STEELY, J. B. MANN and H. M. STEELY, JR., for appellee.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. EXECUTORS AND ADMINISTRATORS, § 237*—*when claim not prematurely filed or contingent.* Where the maker and three out of six joint indorsers of certain notes were insolvent, and two of the others paid such notes partly by cash and partly by new notes given subsequently to the death of the third solvent indorser, and filed a claim against the latter's estate within one year after let-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Trego v. Estate of Cunningham, 205 Ill. App. 25.

ters of administration were issued therein for contribution to such payments made on their joint obligation, *held* that such claim would not be subject to objection that it was prematurely filed, or contingent or payable only out of subsequently discovered assets.

2. EXECUTORS AND ADMINISTRATORS, § 264*—*when written pleadings unnecessary.* In a suit to compel contribution by the estate under a joint obligation of the decedent and the claimant originally begun by filing a claim in the Probate Court, no written pleadings would be necessary to present questions as to the premature filing of the claim or its contingent character, or that it was only payable out of subsequently discovered assets.

3. EXECUTORS AND ADMINISTRATORS, § 101*—*when duty of executors to make defense to a claim.* It is the duty of executors of an estate to make defense to a claim against the estate as to its premature filing or contingent character, or that it is payable out of subsequently discovered assets at the first trial in the Probate Court and in all courts through which the case may pass.

4. APPEAL AND ERROR, § 1725*—*when decision on former appeal res judicata.* The holding by the Supreme Court on appeal from a judgment on a former trial that certain claims presented in the Probate Court which were objected to on a second trial as being prematurely filed should be allowed, and certain other claims could be allowed if certain facts not involving the time of their presentation were shown, *held* to be *res judicata* that such claims were duly and timely filed, on appeal from a judgment on such second trial.

5. JUDGMENT, § 442*—*what doctrine of res judicata embraces.* The doctrine of *res judicata* embraces not only what has been actually determined in the former suit but extends to any other matter which might have been raised and determined in it.

6. CONTRIBUTION, § 1*—*when joint indorsers liable to contribute to payment of note.* The liability of joint indorsers on a note to contribute to payment of the note made by part of them, *held* not to be affected by the fact such note was not by its terms due at a time certain and was not negotiable where such indorsers were original joint obligors.

7. CONTRIBUTION—*when evidence of indebtedness to corporation of joint obligors on note of corporation inadmissible.* Where two of three joint obligors and indorsers on the note of a certain corporation filed a claim against the estate of the third joint obligor to compel contribution to a payment made by such two joint obligors of such note, evidence that the latter were indebted to the corporation for unpaid subscriptions and for money borrowed, *held* inadmissible.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Polly Dunham, Plaintiff in Error, v. Estate of Abraham Stephens, Deceased, Defendant in Error.

(Not to be reported in full.)

Error to the Circuit Court of McLean county; the Hon. THOMAS M. HARRIS, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded with directions. Opinion filed April 16, 1917.

Statement of the Case.

Petition by Polly Dunham, plaintiff, against the estate of Abraham Stephens, deceased, defendant, to establish plaintiff's right as half-sister and heir at law of the decedent to one-quarter of a certain fund saved to the defendant from the amount devised to Mary Ella Chapman and Anna D. O'Harra by the decedent, by the settlement and compromise of a certain suit to contest the decedent's will. From a decree dismissing the petition, plaintiff brings error. For case on prior hearing decided by the Appellate Court, see *Dunham v. Stephens' Estate*, 190 Ill. App. 554, reversing a decree dismissing the petition on demurrer and remanding.

THURMAN, HUME & KENNEDY and LIVINGSTON & BACH, for plaintiff in error.

STERLING & WHITMORE and DE MANGE, GILLESPIE & DE MANGE, for defendant in error.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1818*—when decision on appeal is conclusive on second trial. The holdings of the Appellate Court on

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Van Valkenburg v. Granite Live Stock Ins. Co., 205 Ill. App. 28.

facts admitted by a demurrer are conclusive on the Circuit Court on a trial of the same case on the merits if the same facts are established by the evidence.

2. **APPEAL AND ERROR, § 1726***—*when decision on former appeal conclusive on Appellate Court.* The holding of the Appellate Court on facts admitted by a demurrer are conclusive on that court on a review of the record on a trial of the same case on the merits if the same facts are established by the evidence, notwithstanding there has been a change in the personnel of the court.

3. **APPEAL AND ERROR, § 1152***—*how Appellate Court may review its own holdings.* The only way the Appellate Court can sit in review of its own holdings is on a petition for a rehearing filed in the proper time.

4. **EXECUTORS AND ADMINISTRATORS**—*when evidence sufficient to show existence of funds subject to distribution.* Evidence held sufficient to show that there was saved by the settlement of a certain will contest from certain legacies a certain amount of intestate funds subject to distribution, in a suit by an heir at law to establish a right to a portion of such funds.

**Stacey Van Valkenburg, Appellee, v. Granite Live
Stock Insurance Company, Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of Vermillion county; the Hon. JOHN H. MARSHALL, Judge, presiding. Heard in this court at the October term, 1916. Reversed with finding of fact. Opinion filed April 16, 1917.

Statement of the Case.

Action by Stacey Van Valkenburg, plaintiff, against the Granite Live Stock Insurance Company, a corporation, defendant, to recover on a policy in defendant company insuring plaintiff's mare. From a judgment for plaintiff, defendant appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Van Valkenburg v. Granite Live Stock Ins. Co., 205 Ill. App. 28.

THOMAS J. GRAYDON and LINDLEY, PENWELL & LINDLEY, for appellant.

ACTON & ACTON, for appellee.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 439*—*when provision for notice to insurer of accident to or illness of animal is valid.* A provision in a live-stock insurance policy that there should be no liability of the insurer thereunder for a loss if the assured in case of accident or sickness to the insured animal should fail to render "at once" notice to the insurer of such sickness or accident, with the name and address of the veterinary employed, *held* to be a reasonable, material and enforceable part of the contract of insurance.

2. INSURANCE, § 439*—*what is effect of failure to comply with provision in policy as to notice of sickness of or accident to animal.* Under a provision in a live-stock insurance policy that there should be no liability of the insurer thereunder for a loss if the assured in case of accident or sickness to the insured animal should fail to render "at once" notice to the insurer of such sickness or accident, with the name and address of the veterinary employed, *held* that the assured was bound to give such notice "at once" upon such sickness or accident under penalty upon failure to do so of a want of liability on the part of the insurer under the policy if death should result from such sickness or accident.

3. INSURANCE, § 439*—*what is meaning of words "at once" in provision in policy for notice of sickness of or injury to animal.* The words "at once" used in a live-stock insurance policy, providing that the assured should give notice "at once" to the insurer of any sickness or accident to the insured animal, *held* to mean what the average person would understand them to mean, namely, promptly, as soon as could reasonably be done, and not a full week after such sickness or accident.

4. INSURANCE, § 666*—*what is evidence of knowledge by insured of failure to give prompt notice of sickness of animal.* In an action to recover on a live-stock insurance policy, requiring the assured to give notice to the insurer "at once" of any sickness or accident to the insured animal, the fact that the assured when he filed his

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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proofs of death of the insured animal stated that it first showed signs of sickness on July 6th, when the proof showed conclusively that it first showed signs of sickness on July 2nd and continued to grow steadily worse until its death, held to be strongly suggestive of the fact that the assured appreciated that notice of sickness had not been promptly given.

5. INSURANCE, § 441*—*what is not excuse for noncompliance with provision for notice of sickness of animal.* Under a provision in a live-stock insurance policy requiring the assured to give notice to the insurer "at once" of any sickness or accident to the insured animal, the fact the assured was away from home when the animal was taken sick would not excuse him from performing such requirement; if he was not so situated, for any reason, that he could personally perform his contract in respect to giving such notice at once, it would be his imperative duty to arrange with others to perform it for him.

6. INSURANCE, § 666*—*when evidence sufficient to show failure to give required notice of sickness of animal.* Evidence held sufficient to show that the plaintiff did not give the defendant notice of the sickness of the insured animal within the time required of him by his contract, in an action to recover under a live-stock insurance policy for the death of the insured animal.

Stacey Van Valkenburg, Appellee, v. Western Live
Stock Insurance Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Vermilion county; the Hon. JOHN H. MARSHALL, Judge, presiding. Heard in this court at the October term, 1916. Reversed with finding of fact. Opinion filed April 16, 1917.

Statement of the Case.

Action by Stacey Van Valkenburg, plaintiff, against the Western Live Stock Insurance Company, a corpo-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Van Valkenburg v. Western Live Stock Ins. Co., 205 Ill. App. 30.

ration, to recover on a live-stock insurance policy. From a judgment for plaintiff, defendant appeals.

This policy was upon the same animal insured in the case of *Van Valkenburg v. Granite Live Stock Ins. Co.*, ante, p. 28, the opinion in which was filed the same day.

THOMAS J. GRAYDON and LINDLEY, PENWELL & LINDLEY, for appellant.

ACTON & ACTON, for appellee.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

INSURANCE, § 666*—*when evidence sufficient to show failure to give required notice of sickness of animal.* Evidence held sufficient to show that plaintiff did not give defendant notice of the sickness of the insured animal within the time required of him by his contract, in an action to recover under a live-stock insurance policy for the death of the insured animal.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Kane, 205 Ill. App. 32.

The People of the State of Illinois for use of State Board of Health of the State of Illinois, Appellant, v. James E. Kane, Appellee.

(Not to be reported in full.)

Appeal from the County Court of Macon county; the Hon. JOHN H. MCCOR, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded. Opinion filed April 16, 1917.

Statement of the Case.

Action by the People of the State of Illinois for the use of the State Board of Health of the State of Illinois, plaintiff, against James E. Kane, defendant, to recover the fines and penalties provided by law for practicing medicine without having a license from the State Board of Health so to do. From a judgment for defendant, plaintiff appeals.

P. J. LUCY, JESSE L. DECK and C. F. EVANS, for appellant.

WHITLEY & FITZGERALD, for appellee.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. PHYSICIANS AND SURGEONS, § 8*—*when State Board of Health has right to sue for and recover penalties for practicing without certificate.* The State Board of Health has the right to sue for and recover the penalties provided in Rev. St. ch. 91, sec. 9 (J. & A. ¶ 7390), relating to persons practicing medicine or treating human ailments without a certificate issued by that board, and providing that such persons shall forfeit and pay to the People of the State of Illinois for the use of that board certain sums to be recovered in an action of debt.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. PHYSICIANS AND SURGEONS, § 5*—*when person is practicing medicine.* One who advertises, professes, offers, undertakes or pretends to undertake to diagnose, treat, heal or benefit a patient, regardless of whether that patient is or is not suffering from any actual ailment or disease, and who charges or accepts compensation therefor, is practicing medicine within the meaning of Rev. St. ch. 91, sec. 9 (J. & A. ¶ 7390), providing that any person shall be regarded as practicing medicine within the meaning of that statute who shall treat or profess to treat, operate on or prescribe for any physical ailment or any physical injury or deformity of another.

3. PHYSICIANS AND SURGEONS, § 8*—*when evidence sufficient to show that person is practicing medicine.* Evidence held sufficient to show that defendant was practicing medicine within the meaning of Rev. St. ch. 91, sec. 2 (J. & A. ¶ 7378), providing that it shall be unlawful for any person to practice medicine in any of its branches without a license so to do from the State Board of Health, and section 9 (J. & A. ¶ 7390), providing that any person shall be regarded as practicing medicine within the meaning of the statute who shall treat or profess to treat, operate on or prescribe for any physical ailment or any physical injury or deformity of another, where the defendant undertook or pretended to diagnose, treat and cure the trouble of his patients by a general formula of diagnosis that "the bones or vertebræ of your back are out of their normal or proper position, etc.," and advertised and assumed or pretended to be able to "place those bones of the back in their normal or proper position," the result of so doing to be health, such adjustment being or being pretended to be by applying pressure and manipulation with his hands.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Steinhour v. Merrilees, 205 Ill. App. 34.

**Abraham B. Steinhour, Appellant, v. Dora Merrilees
et al., Appellees.**

(Not to be reported in full.)

Appeal from the Circuit Court of Logan county; the Hon. THOMAS M. HARRIS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by Abraham B. Steinhour, plaintiff, against Dora Merrilees and others, defendants, to recover \$1,200 advanced by plaintiff under a contract with defendants for the purchase of certain real estate. From a judgment for defendants, plaintiff appeals.

HUMPHREY & ANDERSON, for appellant.

BEACH & TRAPP, for appellees.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. *WILLS, § 383**—*when estates in reversion and contingent remainder created.* A will devising the testator's estate in part to a certain daughter for life, and upon her death such part to the heirs of her body or their survivors, and providing that in case of the death of any of the testator's daughters leaving no heirs of her body such daughter's share should descend to the testator's surviving daughters, *held* to create estates in reversion and contingent remainder based on the life estate.

2. *ESTATES, § 11**—*when life estate and reversion merged in same person by conveyance.* When the members of a class who are by the terms of a will to take the remainder at the death of a life tenant cannot be ascertained until that event takes place, and the life tenant and the owner of the reversion convey their interests to

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the same person, the life estate and the reversion merge in such person.

3. REMAINDERS, § 16*—*when contingent remainder defeated*. A contingent remainder is defeated by merger of the life estate and the reversion.

4. APPEAL AND ERROR, § 1471*—*when admission of evidence of oral modification of contract is harmless error*. In an action to recover money advanced under a contract for the purchase of real estate conditioned upon defendant furnishing a deed conveying good title, the admission of evidence that a modification of the contract was made in a conversation between the parties whereby it was agreed that certain deeds tendered should be accepted as conveying good title, *held*, even if erroneous, to be harmless error where the deeds tendered were sufficient to convey good title.

5. APPEAL AND ERROR, § 384*—*when objections may not be availed of on appeal*. Objections not presented to or passed upon by the trial court cannot be availed of on appeal.

O. P. Simpson, Administrator, Appellant, v. Artamisa Roberts and J. O. Roberts, Conservator, Appellees.

(Not to be reported in full.)

Appeal from the Circuit Court of Shelby county; the Hon. THOMAS M. JETT, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by O. P. Simpson, administrator of the estate of William Simpson, deceased, plaintiff, against Artamisa Roberts and J. O. Roberts, conservator of Artamisa Roberts, feeble-minded, defendants, to recover money claimed to have been expended and services claimed to have been rendered for Artamisa Roberts while the decedent was conservator for her over and above the amount received by him for her use.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Simpson v. Roberts et al., 205 Ill. App. 35.

From a judgment for defendants, plaintiff appeals.

LOGAN G. GRIFFITH and BUCKINGHAM, McDAVID & MONROE, for appellant.

J. C. WILLARD, for conservator.

TRUMAN E. AMES, conservator *ad litem*.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 228*—*what is necessary foundation for proof of conservator's reports.* In an action by the administrator of the estate of a conservator for a feeble-minded person to recover for moneys expended and services rendered by the decedent for his ward, certain reports filed in the County Court by or for the decedent of his acts and doings as such conservator, held to be incompetent evidence, even prima facie, of the facts contained in such reports without proof of an adjudication of the correctness of such reports by the court in which they were filed.

2. EVIDENCE, § 228*—*when proof of adjudication of correctness of reports of conservator insufficient.* Proof of an adjudication of the correctness of certain reports filed by a conservator of a feeble-minded person in the County Court of his acts and doings as such conservator can only be made by the record of that court, and a mere memorandum on such a report to the effect that it had been approved by the "County Judge" would be insufficient as proof of such adjudication, in an action wherein such reports were introduced in evidence to establish payments made or services rendered by such conservator.

3. GUARDIAN AND WARD, § 1*—*how conservator may not act.* There is no law authorizing a conservator to act by attorney in fact.

4. GUARDIAN AND WARD, § 74*—*what not proper charge against ward.* The funeral expenses of the mother of a ward under conservatorship are not primarily a necessity of nor a proper charge against the ward.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ollie Sampson, Plaintiff in Error, v. Betta L. Harshman and Clement E. Harshman, Defendants in Error.

(Not to be reported in full.)

Error to the Circuit Court of Moultrie county; the Hon. WILLIAM K. WHITFIELD, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by Ollie Sampson, plaintiff, against Betta L. Harshman and Clement E. Harshman, defendants, to recover damages for personal injuries sustained by plaintiff by the wagon in which he was riding being upset by a runaway team belonging to one of defendants, whereby plaintiff's ankle was sprained. From a judgment for plaintiff for twenty-five dollars, plaintiff brings error.

J. K. MARTIN and JENNINGS & ELDER, for plaintiff in error.

E. J. MILLER, for defendants in error.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

DAMAGES, § 191*—*when determination of question for jury.* In an action to recover damages for a sprained ankle, where there was no evidence that plaintiff did not in fact receive his contract wages for the time he was laid up after the accident, or that his failure to work during that time testified to was due to the accident, or that he expended any money for medical services, medicine or anything else in and about being healed, *held* that the amount of damages plaintiff was entitled to receive was a matter of estimate, not of definite proof, and was peculiarly within the province of the jury to determine.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Rich v. Wilson et al., 205 Ill. App. 38.

A. R. Rich, Administrator, Defendant in Error, v. Blueford Wilson and William Cotter, Receivers, Plaintiffs in Error.

(Not to be reported in full.)

Error to the Circuit Court of Jersey county; the Hon. NORMAN L. JONES, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded. Opinion filed April 16, 1917.

Statement of the Case.

Action by A. R. Rich, administrator of the estate of Ritzpah Hudson Rich, deceased, plaintiff, against Blueford Wilson and William Cotter, receivers of the Chicago, Peoria & St. Louis Railroad Company, defendants, to recover pecuniary damages for the benefit of the next of kin because of the death of a little girl four years old, caused by a collision between defendants' train and an automobile in which the decedent was riding driven by her mother. From a judgment for plaintiff for \$5,000, defendants bring error.

H. L. CHILD, for plaintiffs in error; P. B. WARREN, of counsel.

W. J. CHAPMAN and D. J. SULLIVAN, for defendant in error.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. RAILROADS, § 775*—*when instruction as to giving of warning signals by train approaching crossing is erroneous.* In an action to recover damages for death due to a collision between an automobile in which the decedent was riding and a railroad train, an instruc-

Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same section number.

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tion that the law required the defendant railroad to have a bell ringing continuously or a whistle sounding continuously on the engine of a train for eighty rods immediately before reaching a public crossing, *held* to be erroneous, as the railroad company had the option of sounding the bell part of the time and the whistle part of the time or of sounding the bell or the whistle all of the time, but was not required to sound either all of the time.

2. DEATH, § 73*—*when instruction on erroneous*. In an action to recover damages for death due to a collision between an automobile in which decedent was riding and a railroad train, *held* that an instruction that the jury "should fix such damages at such amount as they may believe from the preponderance of the evidence will justly and fairly compensate the next of kin" was erroneous.

3. DEATH, § 67*—*when verdict for death of child excessive*. In an action to recover damages for the death of a four-year-old child for the benefit of the next of kin, where there was no evidence of whether the child was well and strong or sickly and weak, or whether it was bright or foolish, or whether its characteristics were such as would likely render it a burden or a benefit to the next of kin, a verdict of \$5,000 damages *held* to be excessive.

**Fred Baber, Trustee, Appellee, v. Erastus Hurst et al.,
Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of Edgar county; the Hon. JOHN H. MARSHALL, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Bill by Fred Baber, trustee, complainant, against Erastus Hurst and others, defendants, to restrain the collection of a certain judgment and to vacate the same. From a decree in favor of the complainant, defendant Hurst appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Baber v. Hurst, 205 Ill. App. 39.

S. J. GEE and T. H. CUNNINGHAM, for appellant.

W. H. CLINTON and O'HAIR & RHOADS, for appellee.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 852*—*when recital in certificate of evidence in suit in equity is improper.* Where a certificate of evidence signed by the trial judge contained a purported order for an appeal reciting that the certificate of evidence should be "presented" within ninety days, held that such recital was improper and inoperative, in a suit in chancery.

2. APPEAL AND ERROR, § 853*—*what is function of certificate of evidence in chancery suit.* The sole function of a certificate of evidence in a chancery suit is to truly set forth the evidence offered, rejected, received and considered on the hearing, and any attempt to make it subserve any other purpose is without warrant of law.

3. CLERKS OF COURTS, § 5*—*what clerk required to enter of record in chancery suit.* All written motions and the orders made thereon are matters to be entered of record by the clerk in a chancery suit.

4. APPEAL AND ERROR, § 958*—*when court of review bound by clerk's record.* A court of review is bound by the clerk's record of written motions and orders made thereon entered by him on such record.

5. APPEAL AND ERROR, § 862*—*when certificate of evidence stricken from record.* A certificate of evidence should, on motion, be stricken from the record where it is not filed within the time fixed in the order allowing appeal.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

F. J. Athon, Appellant, v. W. B. McAllister, Sheriff, Appellee.

1. **FRAUDULENT CONVEYANCES, § 15***—*when transfer within Bulk Sales Act.* A transfer by a party of certain office furniture, horses, colts, wagons, trucks, drays, harness, farm machinery, hogs, pigs, growing corn and the like, used or produced either in the dray and transfer business or in the business of farming in which such party had been engaged, *held* to be within the Bulk Sales Act of 1913, Rev. St. ch. 121a, sec. 1 [Cal. Ill. St. Supp. 1916, ¶ 10021(1)].

2. **EXECUTION, § 92***—*when levy may be made upon personalty.* A sheriff may levy an execution in his hands upon personal property after he has levied the same on real estate and before the real estate is sold under such levy.

Appeal from the Circuit Court of Edgar county; the Hon. JOHN H. MARSHALL, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

W. H. CLINTON and O'HAIR & RHOADS, for appellant.

EMERY ANDREWS, JAMES K. LAUHER and STEWART W. KINCAID, for appellee.

MR. JUSTICE GRAVES delivered the opinion of the court.

Appellee, as sheriff of Edgar county, levied on certain real estate and later on some personal property by virtue of an execution issued on a judgment against one Moreau Athon and S. L. Sheets and in favor of Philip Bibo.

Appellant replevied the personal property levied on, claiming that Moreau Athon had transferred it to him in consideration of the payment by appellant of a certain promissory note of the said Moreau Athon, held by the First National Bank of Paris, Illinois, for \$12,-075, on which appellant was surety.

Moreau Athon was engaged in the dray and transfer

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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business and in farming. The personal property conveyed had all been used or produced in one or the other of these businesses and consisted of office furniture, horses, colts, wagons, trucks, drays, harness, farm machinery, hogs, pigs, growing corn and the like.

The Circuit Court tried the case without a jury and held that the transfer of the property was void under the provisions of the Act of the General Assembly of the State of Illinois, approved May 3, 1913, known as the Bulk Sales Act, and entered judgment for the defendant and ordered the property returned to the defendant to be sold under the execution by virtue of which it was levied upon.

Section 1 of chapter 121a, Rev. St. [Cal. Ill. St. Supp. 1916, ¶ 10021(1)], known as the Bulk Sales Act, provides, so far as its provisions are important here, as follows:

“That the sale, transfer, or assignment in bulk of the major part or the whole of a stock of merchandise, or merchandise and fixtures, or other goods and chattels of the vendor’s business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the vendor’s business shall be fraudulent and void as against the creditors of said vendor, unless the said vendee shall, in good faith, at least five days before the consummation of such sale, transfer or assignment demand and receive from the vendor a written statement under oath of the vendor or a duly authorized agent of the vendor having knowledge of the facts, containing a full, accurate and complete list of the creditors of the vendor, their addresses and the amounts owing to each as near as may be ascertained, and if there be no creditors, a written statement under oath to that effect; and unless the said vendee shall at least five days before taking possession of said goods and chattels and at least five days before the payment or delivery of the purchase price, or consideration of any evidence of indebtedness therefor, in

good faith, deliver or cause to be delivered or send or cause to be sent personally or by registered letter properly stamped, directed and addressed, a notice in writing to each of the creditors of the vendor named in the said statement or of whom the said vendee shall have knowledge of the proposed purchase by him of said goods and chattels and of the price, terms and conditions of such sale * * *."

Appellant presents but two questions for our determination: First. Does the Bulk Sales Act apply to the facts in this case? Second. Had the sheriff a right to levy the same execution on personal property after he had levied the same on real estate and before the real estate had been sold, or, in other words, was the levy of the execution on real estate a satisfaction of the judgment until by a return of the execution unsatisfied the contrary appears?

Appellant insists that the determination of the first question should be governed by what is said in *Heslop v. Golden*, 189 Ill. App. 388, and *H. S. Richardson Coal Co. v. Cermak*, 190 Ill. App. 106.

The court in the case of *H. S. Richardson Coal Co. v. Cermak*, *supra*, seems to rest its holding on a construction of the statute here under consideration that it does not apply to the sales of all kinds of personal property but was intended to apply only to such property as was a part of a "business or trade where, in the ordinary course and regular prosecution thereof, the goods or chattels, whatever they might consist of, are not ordinarily and regularly sold by the owner in bulk," and in *Heslop v. Golden*, *supra*, the statute was held to apply only to property "used in connection with the business of selling merchandise, commodities or other wares."

A former Bulk Sales Act was held unconstitutional and void in *Charles J. Off & Co. v. Morehead*, 235 Ill. 40, because that act was construed to apply only to

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merchants selling their stocks in trade, and to be, therefore, special legislation. The holdings in the *Heslop* and *Richardson* cases, *supra*, seem to be an application of the principles announced in the *Morehead* case, *supra*, to the present Bulk Sales Act. We are driven to the conclusion that the present act is not faulty in the respect which the Supreme Court held caused the former act to be void.

The present act was passed shortly after the opinion in the *Morehead* case was handed down, and the Legislature in passing it evidently intended to obviate in the new act the things that were fatal to the old one.

Section 3 of the Act now in force [Cal. Ill. St. Supp. 1916, ¶ 10021(3)] is as follows:

“Vendors and vendees under this act shall include corporations, associations, copartnerships and individuals, who shall be party to any sale, transfer or assignment of goods and chattels in bulk. But nothing contained in this act shall apply to sales by executors, administrators, receivers, trustees in bankruptcy, or by any public officer under judicial process nor to sales of exempt property or any sale or transfer made in the ordinary course of trade and in the regular and usual prosecution of the vendor's business, nor to sales made in good faith at public auction, where notice of such sale is given in a newspaper of general circulation within the county where such sale is made, at least ten days before such sale or by posting of notices in at least five public places at least ten days before said sale.”

The opinion in *G. S. Johnson Co. v. Beloosky*, 236 Ill. 363, was written by the same learned justice of the Supreme Court who wrote the opinion in *Charles J. Off & Co. v. Morehead*, *supra*, and after calling attention to the difference in the language of the two acts the court holds that the last act obviates the objectionable features in the first one, because it “prohibits the

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sale of *any goods and chattels in bulk, otherwise than in the ordinary course of trade.*”

In *Page v. Wright*, 194 Ill. App. 149, a sale of a livery stock was held to be within the prohibitions of the Bulk Sales Act. The judgment of the Appellate Court in that case was reviewed by the Supreme Court on a petition for certiorari, which was denied.

It cannot be denied that the sale of the property in this case was in bulk, neither can it be claimed that the sale was in the ordinary course of trade, or that any attempt was made to comply with the provisions of the Bulk Sales law. The Circuit Court was clearly right in holding that the attempted transfer of the goods here involved from Moreau Athon to appellant was void, and that appellant acquired no rights thereby as against the creditors of Moreau Athon.

The contention that by levying the execution on real estate the right to levy on personal property was lost is answered adversely in *Everingham v. National City Bank of Ottawa*, 124 Ill. 527.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

John R. Myers, Appellee, v. Modern Woodmen of America, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Macon county; the Hon. WILLIAM K. WHITFIELD, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by John R. Myers, plaintiff, against the Modern Woodmen of America, defendant, to recover on a

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fraternal benefit certificate as the beneficiary named therein issued by the defendant to Henry M. Myers, deceased. From a judgment for plaintiff for \$2,058, defendant appeals.

TRUMAN PLANTZ and GEORGE G. PERRIN, for appellant.

CHESTER A. SMITH, for appellee.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 825*—*what is right of holder of benefit certificate to change beneficiaries.* A member of a fraternal beneficial association has the undoubted right during his lifetime to change the beneficiaries named in his original certificate.

2. INSURANCE, § 827*—*when attempted change in beneficiary in benefit certificate becomes effective.* No attempted change in the beneficiary named in a benefit certificate issued by a fraternal beneficial association will be effective until a new certificate has been issued during the lifetime of the member in which a new beneficiary is named.

3. INSURANCE, § 823*—*when equitable rule as to change of beneficiaries inapplicable in action at law.* The equitable rule that when a member of a fraternal beneficial association has done all that he can do to change his beneficiary it will be regarded as done has no application in actions at law where the distinction between law and equitable jurisdiction is preserved.

4. INSURANCE, § 822*—*when beneficiaries have vested rights in benefit certificate.* The beneficiaries named in a certificate issued by a mutual beneficial association have no vested rights therein until the death of the member.

5. INSURANCE, § 822*—*when rights of beneficiary in benefit certificate attach.* The rights of the beneficiary named in a certificate of membership in a mutual beneficial association attach immediately upon the death of such member.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Thomas A. McMahon, Appellant, v. Selena Crone,
Appellee.**

(Not to be reported in full.)

Appeal from the Circuit Court of Greene county; the Hon. NORMAN L. JONES, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by Thomas A. McMahon, plaintiff, against Selena Crone, defendant, to recover on a promissory note amounting, with interest, to \$266.88, and a loan of \$41. From a judgment for defendant, plaintiff appeals.

THOMAS A. MCMAHON and **SUMNER & REARDON**, for appellant.

FRANK A. WHITESIDE, for appellee.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. **TRIAL, § 153***—*when determination of weight of evidence is for jury.* The evidence as to the claim sued on being conflicting, held that it was the province of the jury to weigh the evidence and pass upon the credibility of the witnesses.

2. **BILLS AND NOTES, § 443***—*when evidence sufficient to show failure of consideration.* Evidence held sufficient to support the finding in favor of the defendant, in an action on a note claimed in defense to have been without consideration and not to have been delivered, and on a payment by plaintiff to defendant claimed by plaintiff to have been a loan to defendant and by defendant to have been payment of a loan by defendant to plaintiff.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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3. ASSUMPSIT, ACTION OF, § 88*—*when evidence as to making of loan is admissible.* In an action to recover money claimed to have been loaned defendant, where it was claimed in defense that the money was a repayment by plaintiff of a loan to him by defendant, evidence as to the amount of the claimed loan by defendant to plaintiff and other evidence tending to show that such loan had been made, *held* to be properly admitted as corroborating evidence in support of such defense.

**Frank L. Trutter, Administrator, Appellee, v. Chicago
& Alton Railroad Company, Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the October term, 1916. Reversed with finding of fact. Opinion filed April 16, 1917.

Statement of the Case.

Action by Frank L. Trutter, administrator of the estate of Joel Wilkerson, deceased, plaintiff, against the Chicago & Alton Railroad Company, defendant, under the Federal Employers' Liability Act to recover on account of the death of decedent from injuries received while he was engaged in defendant's employ as car inspector. From a judgment for plaintiff for \$4,900, defendant appeals.

PATTON & PATTON, for appellant; SILAS H. STRAWN, of counsel.

GULLETT & GULLETT, A. M. FITZGERALD and W. A. RUEGG, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Cory v. City of Hillsboro, 205 Ill. App. 49.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

MASTER AND SERVANT, § 177*—*when railroad company not guilty of negligence in shunting cars on switching track.* In an action under the Federal Employers' Liability Act to recover for the death of defendant's employee as car inspector on defendant's railroad, where there was no proof showing how the decedent was injured, or what he was doing when injured or what car ran over him, and no one saw him injured, and he was last seen alive by an alleged vice principal, who, while on his way out of the switching yard, observed that some cars which were being shunted on a switching track had the air hose thereon uncoupled and started to couple them, but upon seeing the decedent approaching assumed that he was about to couple the hose and turned and left the yards without knowing of the accident to the decedent, who was found after the accident on another track, and the proof showed the usual and customary manner of placing cars in making up trains in the yards where decedent was injured was to shunt them in and that the decedent knew of such manner of placing cars, *held* that defendant was guilty of no negligence in connection with the circumstances resulting in the decedent's death.

Mary M. D. Cory et al., Appellants, v. City of Hillsboro, Appellee.

(Not to be reported in full.)

Appeal from the Circuit Court of Montgomery county; the Hon. JAMES C. McBRIDE, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Bill by Mary M. D. Cory and others, complainants, against the City of Hillsboro, defendant, for injunc-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tion to restrain defendant from rebuilding a certain highway dyke or grade washed away by a flood and to require defendant to remove such dyke or grade as an obstruction to the natural flow of the water. From a decree denying the relief asked and finding the complainants guilty of laches as to removal of the existing grade, complainants appeal.

WILLIAM ABBOT and HILL & BULLINGTON, for appellants.

J. M. BAKER, for appellee; LANE, DRYER & BROWN, of counsel.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. EQUITY, § 73*—*what constitutes laches*. Laches is negligence or omission to assert a right.

2. EQUITY, § 73*—*what constitutes laches*. Laches, in a general sense, is the neglect for an unreasonable and unexplained length of time to do that which could and should have been done earlier, if at all.

3. EQUITY, § 74*—*what is rule as to determination of laches*. There is no absolute rule by which to determine what constitutes laches, but it depends on the circumstances of each particular case.

4. EQUITY, § 79*—*what is nature of laches as defense*. Laches is an equitable defense and is allowed to do justice between the parties under all the circumstances without regard to the statute of limitations or the passage of any definite period of time.

5. EQUITY, § 74*—*discretion of court as to determination of laches*. What will constitute laches in a given case rests largely in the conscience and discretion of the court.

6. APPEAL AND ERROR, § 1350*—*when decision of court as to what constitutes laches not disturbed*. Unless the discretion of the court in determining the question of laches in a case is abused it will not be interfered with by a court of review.

7. EQUITY, § 74*—*when delay in bringing suit is bar to recovery*. Failure to use reasonable diligence in bringing a suit to enforce a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Dunsworth v. Chicago & Alton R. Co., 205 Ill. App. 51.

right after the facts are known to a complainant is fatal to his right to recover.

8. *EQUIRY, § 78*—when delay in filing suit for injunction against city to require removal of grade is fatal.* Where a city unlawfully raised the grade of a certain highway several feet above the natural surface and complainants had personal knowledge of such grade, and that a great amount of work was being done and money expended by the city in raising such highway and they made no effort to prevent such grading for fifteen years until the time of filing suit against the city for an injunction to require removal of such grade, *held* that the finding in such suit that complainants had slept on their rights and decree denying such injunction were not an abuse of the court's discretion.

**John W. Dunsworth, Appellee, v. Chicago & Alton
Railroad Company, Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of Greene county; the Hon. NORMAN L. JONES, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by John W. Dunsworth, plaintiff, against the Chicago & Alton Railroad Company, defendant, to recover for failure of defendant to deliver certain cattle shipped by plaintiff from Carrollton, Greene county, Illinois, to East St. Louis, and there reshipped to Van Norman, Lawler & Company, commission merchants, at the Union Stockyards, Chicago, over defendant's railroad. From a judgment for plaintiff for \$4,140, defendant appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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T. I. McKNIGHT, for appellant; SILAS H. STRAWN, of counsel.

WHITESIDE & WRIGHT, for appellee.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. CARRIERS, § 4*—*when connecting railroad and transfer company are common carriers.* Where the defendant railroad received certain live stock for shipment from a point outside of Chicago to a consignee at the Union Stockyards, Chicago, under an arrangement with another railroad for the cars of defendant to pass over the tracks of the other railroad from Western avenue, Chicago, to unloading chutes at the Union Stockyards at a certain price per car, defendant's trainman doing the actual work of conducting or transferring the cars from Western avenue to such chutes, and with the Union Stockyards & Transit Company for the unloading of such cars at such chutes and delivery to the consignee at a certain price per car, *held* that such other railroad and the Union Stockyards & Transit Company were common carriers connecting with defendant in such shipment.

2. CARRIERS, § 188*—*when connecting railroad and stockyards company are agents of initial carrier.* Where the defendant railroad received certain live stock for shipment from a point outside of Chicago to a consignee at the Union Stockyards, Chicago, under an arrangement with another railroad for such cars to pass over the tracks of the other railroad from Western avenue, Chicago, to unloading chutes at said yards at a certain price per car and with the Union Stockyards & Transit Company for unloading such cars at such chutes and delivering them to the consignee at a certain price per car, *held* that the other railroad and the Union Stockyards & Transit Company were defendant's agents for the transportation and delivery to the consignee of such cars, for whose acts, if negligently performed, defendant was liable to respond in damages.

3. CARRIERS, § 190*—*what is sufficient proof of knowledge of initial carrier of its duty to deliver stock to consignee.* The fact that the defendant railroad hired and paid the Union Stockyards & Transit Company to unload and deliver to the consignee certain

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Dunsworth v. Chicago & Alton R. Co., 205 Ill. App. 51.

live stock received for shipment by defendant, *held* to not only prove conclusively that said company was defendant's agent but to prove that defendant's own construction of its duty as a common carrier of live stock was that it was obliged to unload and deliver the same to the consignee, in an action to recover damages for failure of defendant to deliver such shipment.

4. CARRIERS, § 188*—*when duty of initial carrier of stock fully performed.* Where the defendant railroad received certain cars of cattle for shipment from a point outside of Chicago to a consignee at the Union Stockyards, Chicago, and defendant, in its regular course of business, transported such shipments by another railroad from Western avenue, Chicago, to unloading chutes at said yards at a certain price per car, paid by it to such other railroad and also paid the Union Stockyards & Transit Company a certain price per car for unloading and delivering such shipments, *held* that defendant's whole duty as a common carrier would not be performed until such shipment had been actually delivered to the consignee.

5. CARRIERS, § 199*—*when burden of proof on initial carrier to show lawful excuse for failure to deliver stock.* In an action to recover damages for failure of a common carrier to deliver a shipment of live stock, where the defendant's duty as initial carrier to deliver such shipment and its failure to deliver it to the consignee were established, *held*, that the defendant had the burden of showing a sufficient lawful excuse for such failure.

6. CARRIERS—*what is sufficient excuse for failure to deliver live stock.* The fact that a shipment of live stock came from a quarantined territory, *held* to constitute a justification for the refusal of the carrier transporting such shipment to unload and its failure to deliver same as required by its contract of carriage.

7. ANIMALS, § 4*—*what not sufficient grounds for destruction of property rights in stock coming from quarantined territory.* A mere rumor, the truth or falsity of which is easy of ascertainment, that a certain shipment of live stock came from quarantined territory, *held* not enough to justify the destruction of property rights without even an attempt to verify or disprove such rumor, in an action to recover damages for failure of the carrier to deliver such shipment under its contract of carriage.

8. CARRIERS, § 93*—*when evidence insufficient to show acceptance of shipment of live stock by shipper.* Evidence *held* insufficient to show plaintiff's agent had accepted a certain shipment of live stock, where such agent attempted to secure possession of such live stock but defendant refused to permit it to be unloaded and delivered, in an action by a shipper to recover damages for failure to deliver such shipment.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Nokomis National Bank v. Hendricks, 205 Ill. App. 54.

Nokomis National Bank, Appellee, v. John F. Hendricks, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Montgomery county; the Hon. THOMAS M. JETT, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded. Opinion filed April 16, 1917.

Statement of the Case.

Action by Nokomis National Bank, plaintiff, against John F. Hendricks, defendant, to recover on a promissory note for \$50 purporting to have been given by defendant. From a judgment for plaintiff for \$55.67, defendant appeals.

J. D. WILSON and LANE, DRYER & BROWN, for appellants.

MILLER & McDAVID and W. G. WEBSTER, for appellee.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. **BILLS AND NOTES, § 410***—*when assignee must prove proper assignment of note.* In an action to recover on a promissory note, where the defendant filed an affidavit denying assignment of the note to the plaintiff, *held* that such affidavit made it necessary for plaintiff to prove that the note was duly and properly assigned by the payee.

2. **BILLS AND NOTES**—*when authority of officer of corporation payee of note to make assignment must be proved by assignee.* Where the payee of a note was a corporation, an affidavit filed in defense to an action to recover on the note denying assignment of it, *held* to destroy every presumption of authority in the officer or

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Nokomis National Bank v. Hendricks, 205 Ill. App. 54.

agent purporting to make the same, and puts the burden of proving not only the assignment but the authority of the person making it to do so upon the party asserting its validity.

3. *BILLS AND NOTES—when authority of agent to make assignment of note must be proved.* After assignment of a note is denied by an affidavit, the doctrine of apparent authority of an agent to make it no longer applies, and such authority is a matter of proof.

4. *BILLS AND NOTES, § 406*—what party suing on assigned note required to prove at common law.* At common law a party suing on an assigned note, if the general issue was filed, was required to prove by a preponderance of the evidence the validity of both the execution and the assignment of it.

5. *BILLS AND NOTES, § 350*—when affidavit denying validity of execution or assignment of note is necessary.* Since the enactment in its present form of section 52 of the Practice Act (J. & A. ¶ 8589), relating to denial of the execution or assignment of an instrument, a defendant in an action on a promissory note is not permitted to deny on the trial the validity of either the execution or assignment of the note unless he files an affidavit or a verified plea denying the validity of such execution or assignment.

6. *BILLS AND NOTES, § 406*—what proof necessary where affidavit or verified plea denying execution or assignment of note filed.* In an action on a promissory note where an affidavit or verified plea is filed denying the execution or the assignment of the note, the same proof of execution or of assignment must be made as in a contested case at the common law.

7. *BILLS AND NOTES, § 406*—what is proper practice where no affidavit or verified plea is filed denying execution or assignment of note.* In an action on a promissory note where no affidavit or verified plea is filed denying the execution or the assignment of the note, the same practice prevails as at common law when no defense was made to such an action, except as such rule is varied by section 59 of the Negotiable Instruments Act (J. & A. ¶ 7698), providing that the holder of a negotiable instrument is deemed prima facie a holder in due course and that when the title of one who negotiated the instrument is shown to be defective the burden is on the holder to prove that he or some person under whom he claims acquired title in due course.

8. *BILLS AND NOTES, § 410*—when rule that burden is upon holder to show acquirement of title in due course is inapplicable.* Where the title of any one who negotiated a negotiable instrument is shown to be defective, the rule that the burden is upon the holder to prove that he or some person under whom he claims acquired title in due

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same table and section number.

Nokomis National Bank v. Hendricks, 205 Ill. App. 54.

course does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

9. **BILLS AND NOTES, § 406***—*what is rule as to burden of proof where holder makes proof of assignment.* When the course established in section 52 of the Practice Act (J. & A. ¶ 8589), providing how a party must proceed to require the holder of a note to make proof of its due and proper assignment, is pursued, the trial proceeds the same and the order and burden of proof are the same as when those same facts were contested at the common law.

10. **BILLS AND NOTES—what does not constitute indorsement.** An indorsement by the "Central Route and Rating Agency" on a note made payable to the "Central Rate and Routing Agency," held not to be an indorsement by the payee of the note in the absence of proof that the two agencies were the same legal entity.

11. **BILLS AND NOTES, § 446***—*what proof necessary to make assigned note evidence of debt to assignee.* In an action on an assigned note, where the validity of the assignment was denied by affidavit, and the indorsement purported to be signed by an agent, such note held to be, without proof of the agency of the party so signing the indorsement, no evidence of a debt of the defendant to the plaintiff and inadmissible.

12. **BILLS AND NOTES, § 319***—*when holder of note may sue thereon in his own name.* Under section 51 of the Negotiable Instruments Act (J. & A. ¶ 7690), providing that the holder of a negotiable instrument may sue thereon in his own name, any holder in whose hands any instrument in writing may be found may not sue thereon regardless of whether such instrument is negotiable on delivery or not.

13. **BILLS AND NOTES, § 319***—*what was purpose of statute allowing holder of negotiable instrument to sue thereon in his own name.* The manifest intention of section 51 of the Negotiable Instruments Act (J. & A. ¶ 7690), providing that the holder of a negotiable instrument may sue thereon in his own name, was to have it apply to the holder in due course of instruments that because of the way they were originally written, or because of a proper indorsement thereon, were negotiable on delivery.

14. **BILLS AND NOTES, § 412***—*when assignee of note required to prove good faith of assignment.* The filing of an affidavit or verified plea denying the validity of an assignment of negotiable paper sued on challenges, among other things, the right of the holder of it to sue it in his own name, and puts him to proof of the *bona fides* of the assignment through which he claims the right to sue.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

National Bank of Decatur, Appellant, v. Board of Education of Decatur School District, Appellee.

1. SCHOOLS AND SCHOOL DISTRICTS, § 118*—*inapplicability of statute as to orders for payment of teachers' wages to district organized under special act.* Section 81 of the General School Act (J. & A. ¶ 10102), relating to orders for the payment of teachers' wages, has no application to a school district organized under a special act.

2. SCHOOLS AND SCHOOL DISTRICTS, § 111*—*when special act provides ample means for borrowing money for teachers' salaries.* The special act under which the defendant school district was organized, held to provide ample means for borrowing money for general school purposes, including teachers' salaries, although such salaries were not specifically mentioned therein.

3. MUNICIPAL CORPORATIONS, § 60*—*when speak through records and documents.* A municipal corporation, as a general rule, speaks only through its records and properly executed documents.

4. MUNICIPAL CORPORATIONS, § 159*—*when officer cannot bind by contract.* No person, committee or officer of a municipal corporation can bind it by contract unless he or they are expressly authorized to do so or the power to do so is necessarily implied from the powers expressly given.

5. MUNICIPAL CORPORATIONS, § 159*—*what is source of authority of officers to bind by contract.* Authority of a person, committee or officer of a municipal corporation to bind it by contract must be given by statute or by the corporation acting within its powers, and in the manner prescribed by law.

6. EVIDENCE, § 116*—*when authority of officer must be shown by record.* When authority is given by a municipal corporation to any person, committee or officer to bind it by contract, such fact can only be shown by the record of the corporation.

7. SCHOOLS AND SCHOOL DISTRICTS, § 87*—*when contract by officer must be ratified by majority vote of members of controlling board.* When a contract is made by any person, committee or officer acting for a school district under its authority, such contract when made under such authority must be ratified by a majority vote of the members of the controlling board of such district.

8. EVIDENCE, § 116*—*what is method of proof of ratification by controlling board by vote of contract of officer.* The vote of the members of the controlling board of a municipal corporation ratify-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Nat'l Bank of Decatur v. Board of Education, 205 Ill. App. 57.

ing a contract made under its authority by any person, committee or officer of such corporation acting for it in making such contract can only be shown by the record of the corporation.

9. EVIDENCE, § 116*—*when ratification of contract by officer for borrowing money must be proved by records.* Where a contract entered into by a municipal corporation acting by any person, committee or officer under its authority is of the character of a contract for borrowing money for the payment of teachers' salaries, there is no exception to the rule that such authority to make and a ratification of such contract can only be shown by the records of the corporation.

10. STATUTES, § 226*—*when construed as controlling.* When a statute provides how a thing shall be done it excludes all other means.

11. SCHOOLS AND SCHOOL DISTRICTS, § 143*—*when declaration in action against district to recover money borrowed is insufficient.* Where a declaration, in an action by a bank against a school district to recover money borrowed for the payment of teachers' salaries, with interest thereon, alleged that the defendant school district, organized under a special act, had adopted the provisions of the general law in regard to the payment of teachers and had made a contract to borrow money and to pay interest thereon for payment of certain salaries, *held* that neither the adoption by defendant of the general school law nor the making by it of such contract was well pleaded.

12. MUNICIPAL CORPORATIONS, § 164*—*when contract to pay interest on money advanced is illegal.* A contract of a municipal corporation to pay interest for money advanced by others to the holders of its outstanding, noninterest-bearing obligations cannot lawfully be made.

13. SCHOOLS AND SCHOOL DISTRICTS, § 143*—*when declaration averring existence of contract of district to pay interest on borrowed money insufficient.* An averment in a declaration of a contract by a school municipal corporation to pay interest on money borrowed by it to pay teachers' salaries, *held* to be insufficient to show any legal obligation on such corporation, because it set up a verbal contract with such corporation and did not show who talked for the corporation or that, whoever it was, had any authority so to do, or that his acts were legally ratified.

14. PLEADING, § 38*—*when taken most strongly against pleader.* Where a declaration set up a certain contract with a municipal corporation, without averring whether it was written or oral and without filing any copy of any contract, *held* that the pleading must

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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be taken most strongly against the pleader, and such contract would be presumed to be oral.

15. TRIAL, § 68*—*when objection to offer of proof properly sustained.* In an action to recover money advanced to a school district to pay teachers' salaries, where the plaintiff offered to prove that the defendant corporation had no money to pay its teachers; that it therefore agreed with plaintiff for plaintiff to advance money to pay defendant's orders for payment of its teachers' salaries; that defendant had issued a certain order for such payment and plaintiff had advanced the money therefor under such prior agreement, and that defendant had agreed to pay interest on such money, *held* that objection to such offer of proof was properly sustained, as the offer did not show how or by whom such proof was to be made, nor how, when, or by whom such agreement was made, as it was a verbal agreement, as stipulated, as it was not stated who the agent, committee or officer was who acted for the corporation in making such agreement, and as there was no offer to prove that at any meeting of the school board any one was authorized to make any contract with plaintiff.

16. EVIDENCE, § 116*—*when oral evidence as to actions of school board at meeting admissible.* Oral proof of the actions of a school board at a regular or called meeting at which all members were present, or had opportunity to be present, is admissible in evidence after it is shown that no record of such meeting existed.

Appeal from the Circuit Court of Macon county; the Hon. WILLIAM K. WHITFIELD, Judge, presiding. Heard in this court at the October term, 1916. *Affirmed.* Opinion filed April 16, 1917.

REDMON, HOGAN & REDMON and McCULLOUGH & WIERMAN, for appellants.

VAIL, MILLER & POGUE, for appellee.

MR. JUSTICE GRAVES delivered the opinion of the court.

Appellee is organized under a special act of the Legislature of the State of Illinois passed in 1865 and is acting under that law.

Appellant, a banking corporation, brought this suit to recover sixty dollars which it gave to one Carrie Jordan for an order which appellee gave to her on

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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January 29, 1915, on its treasurer for that amount, to pay her for her services as a school teacher, and interest thereon at the rate of five per cent. Appellee does not deny that it owes the sixty dollars and after this suit was brought it tendered to appellant that amount together with all costs made up to that time, and upon the tender being refused brought the same into court, but it does deny that it is liable for interest.

A demurrer to three special counts on the declaration, one of them being designated as an additional count, was sustained and appellant stood by those counts. The case was tried by the court without a jury on the common counts and a plea of the general issue. The court found that appellee was not liable for interest and entered judgment against appellant for costs subsequent to the tender. The bank appeals.

The first of the three counts to which the demurrer was sustained places appellant's right to recover on the theory that section 81 of the General School Act of Illinois (J. & A. ¶ 10102) is in force in appellee school district. If that section is there in force, then appellant is undoubtedly entitled to interest because the steps pointed out in that section, which, if followed, would make appellee liable for interest, are shown by this count to have been followed in this case.

That section is part of the general act which is complete in itself. Section 51 of that Act (J. & A. ¶ 10072) provides that districts existing under special acts may adopt the general act and how it may be done. There are some sections in that act so worded as to apply to all school districts whether operating under the general act or under a special law. Other sections of it have been held so to apply. There is no pretense that any attempt has ever been made by appellee district to adopt the general school law. Section 81 does not purport to apply to any school district that has not adopted the general act, nor has it ever been held in any court to apply to districts acting under special

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laws, and section 276 (J. & A. ¶ 10314) of the general law provides that this act "shall not be construed so as to repeal or change in any respect any special act, in relation to schools." The special act under which appellee is operating contains ample means for borrowing money for general school purposes, which unquestionably includes teachers' salaries, although such salaries are not specifically and in express terms mentioned therein. *Franklin County v. Layman*, 145 Ill. 138. No reason is apparent justifying a holding that section 81 of the General School Act applies to appellee.

The second special count to which demurrer was sustained was drafted on the theory that appellee had contracted to pay interest. This count after averring that appellee was operating schools and hiring teachers, and that it had no funds in the treasury, avers that for the purpose of making the necessary provisions for continuing said schools in operation it did adopt as a rule for carrying their duties into effect the provisions of the general act above referred to in regard to the payment of teachers, and did then and there pursuant to the law as in said act provided "issue the order in question"; that it was afterwards presented to the treasurer of appellee and marked: "Presented this Feby. 1, 1915, and not paid for want of funds," and that appellee did then and there agree with the plaintiff that the plaintiff should cash said order for said teacher and that defendant would pay the said order to the plaintiff with interest thereon at the rate of five per cent. per annum from the time said order was presented to its treasurer until such time as the treasurer had the money with which said order could be legally paid. The transfer of the order to appellant and the fact that the treasurer then had money in his hands with which the same could be paid and his refusal to pay is averred.

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The amended or third special count is substantially the same as the second special count as to the contract made with appellant to take up the order in question, except that it is averred that the contract was made before the order was issued, and that it applied to orders issued to other teachers as well as Miss Jordan.

In considering the sufficiency of these counts it must be kept in mind that appellee is a municipal corporation and that as a general proposition it speaks only through its records and properly executed documents, and that no person, committee or officer of such a corporation can bind it by contract, unless he or they are expressly authorized to do so, or the power to do so is necessarily implied from the powers expressly given, and that such authority must be given by statute or by the corporation, acting within its powers and in the manner provided by law. It must also be remembered that when authority to make a contract is given by such a corporation, that fact can only be shown by the record, and the contract when made under such authority must be ratified by a majority vote of the members of the controlling board of such corporation, which vote can only be shown by the record of the corporation. We know of no exception to that general rule where the contract to be entered into is of the character of the one before us.

It is said in "Cyc." vol. 35, page 958:

"The power of a school board or committee to enter into contracts on behalf of the school district must be exercised by them as boards and not as individuals; and hence it is necessary, in order that such a contract may be binding, that it be authorized or executed at a board meeting regularly adjourned to, or regularly called, at which all the members of the board are present or have had notice to be present * * *. In accordance with these rules a contract is not binding on the district, if it is executed by members of the board acting separately and individually and not as a

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body convened for the transaction of business, although it is actually executed by a majority of the board * * * nor will the ratification of such a contract by the individual members make the contract valid and binding."

The averment in the second special count, to the effect that appellee adopted as a rule for carrying these duties into effect the provisions of the general law in regard to the payment of teachers, means nothing as to the legal rights or abilities of appellant. In the first place the act under which appellee was operating provided how money to pay its teachers could be obtained, and when a statute provides how a thing shall be done it excludes all other means. That principle applies here doubly, for not only does the special act provide how the directors can raise money, but section 51 of the General School Act provides how that act may be adopted. If appellee did do as the averment charges, it was not acting within the provisions of either the special act or the general law.

The averments in the second special and the additional or third special counts to the effect that appellee contracted with appellant to pay the teacher's salary orders when issued, together with the accrued interest thereon, is no better. Assuming that the making of such a contract was well pleaded, which it is not, it would violate the same rule, for in making it neither the special character nor the general law would be followed. It would be a contract appellee would have no power to make and could not be compelled to perform.

The averment is further faulty in that it sets up a contract of a municipal corporation to pay interest for money advanced by others to the holders of its outstanding, noninterest-bearing obligations. Such a contract as that cannot lawfully be made. *Hardin County v. McFarlan*, 82 Ill. 141; *Locke v. Davison*, 111 Ill. 19. In the case of *Jackson County v. Rendleman*, 100 Ill. 379, the Supreme Court sustained a contract for the

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payment of interest for the reason that a contract which the interest-bearing warrants were issued to liquidate bore interest.

That averment is further insufficient to show a legal obligation because it sets up a verbal contract with a municipal corporation and does not show who talked for the corporation, or that whoever it was had any authority whatever so to do, or that his acts were ever legally ratified. See citation from 35 Cyc. 958, already quoted.

That it was a verbal contract that is referred to in the second and third special counts is shown by the counts themselves, for it is not averred that it was in writing, neither is any copy of any written contract filed with the declaration. Under the rule that all pleadings must be taken most strongly against the pleader, it must be presumed that the contract is an oral one. More than that, during the trial of the case on the common counts and general issue, it was stipulated that there was no written contract and that there was no record of any oral one or of any action of the board in relation to any contract, oral or written. Neither is there any averment in any of the counts that the board ever in fact held a meeting at which any action in relation to making the contract averred was taken or considered, or any authority given to any one to enter any such contract or at which any such contract was ever ratified.

Clearly no legal liability was averred in either of the three special counts mentioned.

At the trial an offer to prove certain things was made by appellant and was objected to by appellee and the objection was sustained. Among the things which appellant then offered to prove, and now claims it should have been allowed to prove, is the following:

"The plaintiff now offers to prove that in the month of January, 1915, the defendant had no moneys in its

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treasury with which to pay its teachers for services; that it entered into an agreement prior to that time with the National bank of Decatur to advance moneys to pay orders issued by the defendant to its teachers for services rendered in the school for the wages; that the defendant did issue the order described in the declaration in this case, and that the plaintiff advanced the money to take up the order by its agreement with the defendant; that the defendant prior to that time agreed with the plaintiff to pay interest to the plaintiff on the moneys advanced by it from time to time to pay its teachers, and at such times as the defendant had no moneys in the treasury with which to pay its teachers."

The objection to the offer was properly sustained. The offer does not show how or by whom the proof offered was to be made. It does not show how, when or by whom the "agreement was made." That it was not in writing appeared from the stipulation before referred to. It is not stated in the offer who the agent, committee or officer was who acted for the district in the making of the "agreement." There is no offer to prove that at any meeting of the board of education at any time, any one was authorized to make a contract with appellant about anything, or that the subject of a contract with appellant concerning the taking up of teachers' salary orders was ever spoken of or considered in any meeting of the board. Conceding for the moment that an oral agreement made by some one acting for appellee would be binding if he had been properly authorized to make it, that authority would necessarily come from an action of the board at a regular or called meeting at which all the members were present or had an opportunity to be present. If such a meeting was had and such authority was given, then oral proof of what was there done would likely be admissible in evidence after it was shown that no record of such a meeting existed. *Vermilion County v. Knight*, 2 Ill. 97; *Franklin County v. Layman*, 145 Ill. 138;

Smith v. Village of Sidell, 205 Ill. App. 66.

School Directors v. Kimmel, 31 Ill. App. 537; *Bartlett v. Board of Education*, 59 Ill. 364; *School District v. Clark*, 90 Mich. 435.

The offer is loose and uncertain and abounds in conclusions. It should have been a statement of the facts appellant proposed to prove by which the conclusions reached by it would be established.

Other defects in the offer might be mentioned, but it is not necessary.

What has been said disposes of all the questions argued. The conclusions reached by the Circuit Court were undoubtedly correct, and its judgment is affirmed.

Judgment affirmed.

Charles T. Smith, Appellee, v. Village of Sidell, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Vermillion county; the Hon. AUGUSTUS A. PARTLOW, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by Charles T. Smith, plaintiff, against the Village of Sidell, a municipal corporation, defendant, to recover damages for personal injuries sustained in a collision between an automobile driven by plaintiff and a rope stretched across one of defendant's streets by its authorities to keep off travel while oil placed thereon for improvement of the road was fresh. From a judgment for plaintiff for one hundred dollars, defendant appeals.

Bridwell v. Utt, 205 Ill. App. 67.

R. ALLAN STEPHENS, for appellant.

LINDLEY, PENWELL & LINDLEY and SWALLOW & BOOK-
WALTER, for appellee.

MR. JUSTICE GRAVES delivered the opinion of the
court.

Abstract of the Decision.

MUNICIPAL CORPORATIONS, § 1107*—*what are questions for jury in action for injuries received by colliding with rope stretched across street.* In an action against a city to recover damages for personal injuries sustained by plaintiff's automobile running into a rope stretched by defendant across one of defendant's streets to keep off travel while oil placed thereon for improvement of such street was fresh, the amount of the injury, whether same was due to defendant's negligence to properly warn the traveling public by lights or otherwise of the obstruction or was due to plaintiff's negligence in driving into the rope, *held* to be questions for the jury.

George P. Bridwell, Appellee, v. John W. Utt,
Appellant.

(Not to be reported in full.)

Appeal from the County Court of Macoupin county; the Hon. ANDREW J. DUGGAN, Judge, presiding. Heard in this court at the October term, 1916. Reversed. Opinion filed April 16, 1917.

Statement of the Case.

Action by George P. Bridwell, plaintiff, against John W. Utt, defendant, to recover for certain groceries sold to defendant's brother on defendant's credit. From a judgment for plaintiff for \$275.23, defendant appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Bridwell v. Utt, 205 Ill. App. 67.

EDWARD C. KNOTTS, for appellant.

THOMAS K. RINAKER and THOMAS RINAKER, for appellee.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. GUARANTY—*when evidence tends to show belief of creditor that obligation was originally that of person other than defendant.* In an action to recover for certain goods sold to defendant's brother on defendant's credit, the fact that after defendant made the statements on which plaintiff relied the goods were delivered and charged by plaintiff to defendant's brother, *held* to tend to establish that plaintiff regarded the obligation to pay for the goods was originally only that of defendant's brother.

2. GUARANTY—*what is evidence that credit was given to third person only.* In an action to recover for goods sold to defendant's brother on defendant's credit, the fact that, after the account for the goods charged to defendant's brother had been running for some time and become of some little moment, plaintiff took from defendant's brother his notes and a chattel mortgage and credited the account a certain amount, and also allowed him to sell part of the mortgaged property, and sought to enforce his lien against another part, and the fact that defendant never paid anything on the account, *held* to be very persuasive evidence that credit was given to defendant's brother and not to defendant.

3. FRAUDS, STATUTE OF, § 2*—*what is test as to whether promise is original or collateral.* In determining whether a promise is original or collateral the test is whether the credit is given to the person sought to be charged or to some one else.

4. GUARANTY—*when evidence sufficient to show giving of credit to third person.* Evidence *held* sufficient to show credit was given to defendant's brother on a sale of certain goods to the brother, in an action to recover for such goods claimed to have been sold on defendant's credit.

5. FRAUDS, STATUTE OF, § 14*—*when promise to pay for goods sold on credit to third person not binding.* In an action to recover for goods sold to defendant's brother claimed to have been sold on the credit of defendant based upon certain alleged statements by defendant, *held* that even if such promises were made by defendant no liability was thereby created on defendant to pay the bill because of the provisions of the Statute of Frauds.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Eli R. Wagler and Noah Wagler, trading as Wagler Brothers, Appellants, v. James A. Norris, Appellee.

(Not to be reported in full.)

Appeal from the Circuit Court of Tazewell county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by Eli R. Wagler and Noah Wagler, trading as Wagler Brothers, plaintiffs, against James A. Norris, defendant, to recover commissions claimed to have been earned by the plaintiffs for selling certain real estate for defendant. From a judgment for defendant, plaintiffs appeal.

WILKINS & BRECHER, for appellants.

WILLIAM A. POTTS, for appellee.

MR. JUSTICE GRAVES delivered the opinion of the court.

Abstract of the Decision.

1. **BROKERS, § 88***—*when evidence sufficient to sustain verdict for defendant in action for commissions.* Evidence held sufficient to sustain a verdict for the defendant, in an action to recover commissions claimed on a sale of defendant's real estate.

2. **TRIAL, § 78***—*when evidence is not proper in rebuttal.* In an action to recover commissions claimed on a sale of real estate, where one of the plaintiffs testified in chief to a certain conversation between him and defendant, and the defendant testified that he had not met the witness at the time and place testified to by the latter, the testimony of another witness offered by the plaintiffs in rebuttal that he saw the former witness and defendant at said

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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time and place, *held* to be competent in chief but properly excluded in rebuttal.

3. APPEAL AND ERROR, § 1565*—*when modification of instruction not prejudicial error*. In an action to recover commissions claimed on a sale of real estate, modification of an instruction offered by plaintiffs by adding the words "and sale" after the word "purchaser" in the clause "and that their services were instrumental in securing a purchaser and sale," *held* to be insignificant and not prejudicial.

4. APPEAL AND ERROR, § 1526*—*when instructions not reversibly erroneous*. Instructions, even if wrong, *held* not reversibly erroneous where the verdict and judgment thoroughly comported with the manifest justice of the case.

**Muskegon Tool & Stamping Company, Appellee, v.
Allith-Prouty Company, Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of Vermilion county; the Hon. AUGUSTUS A. PARTLOW, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by Muskegon Tool & Stamping Company, plaintiff, against Allith-Prouty Company, defendant, to recover on a sale by plaintiff to defendant of certain dies. From a judgment for plaintiff, defendant appeals.

J. B. MANN and O. D. MANN, for appellant.

LINDLEY, PENWELL & LINDLEY, for appellee; WALTER C. LINDLEY, of counsel.

MR. JUSTICE GRAVES delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Muskegon Tool & Stamping Co. v. Allith-Prouty Co., 205 Ill. App. 70.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 804***—*when weight of evidence will not be determined.* Where certain dies introduced in evidence were not made part of the bill of exceptions, *held* that the weight of the evidence could not be determined on review.

2. **APPEAL AND ERROR, § 1303***—*when presumed that evidence was sufficient to support judgment.* When all of the evidence is not contained in a bill of exceptions, it will be presumed in support of a judgment that there was all the evidence necessary to justify the one rendered.

3. **SALES, § 326***—*when expert evidence of commercial marketability of article manufactured with dies inadmissible.* Where the defense to an action based upon a sale by plaintiff to defendant of certain dies raised the question whether the dies were fit for the use for which they were purchased, namely, to make a certain hinge, a question asked of a witness as a mechanical expert whether the dies would produce the hinges so the hinges could be "commercially marketable," *held* to be improper, as the commercial marketability of the hinges was not involved in the case and as the question was answered in the negative and the answer remained in the record.

4. **TRIAL, § 58***—*when objection to question already answered properly sustained.* Where a witness, after he had stated that he did not know what day a certain party was coming to a certain place, was asked the question: "You knew he was coming, and didn't you have word he was coming that day?" *held* that an objection to such question was properly sustained, as, if pertinent, it had been answered and there was no occasion to clog the record with a repetition.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Peter Brethorst, Appellee, v. O. H. Wylie, State's-Attorney of Ford County, Illinois, Appellant.

1. QUO WARRANTO, § 26*—*what is discretion of State's Attorney as to presenting petition.* Where only public rights are involved, the State's Attorney has an arbitrary discretion as to presenting or refusing to present a petition for quo warranto.

2. QUO WARRANTO—*what are requisites of affidavit where private rights involved.* Where private rights are partly or solely involved in a petition for quo warranto, the affidavit in support of such petition must be made on knowledge and not on information and belief, and must be full, complete and positive, and so drawn that perjury may be assigned thereon if its statements be untrue.

3. QUO WARRANTO—*when affidavit in support of petition for quo warranto insufficient.* A notary's certificate that an affiant "being first duly sworn upon his oath, deposes and says that he has heard read the above affidavit and knows the contents thereof and that the matters and facts therein contained are true except as to those matters and things stated on his information and belief and as to those he believes them to be true," *held* to be insufficient to sustain a petition for quo warranto, as no one could tell what is stated on information and belief and what on the affiant's own knowledge, and as perjury could not be assigned on the affidavit, if untrue.

4. QUO WARRANTO—*when affidavit in support of petition for quo warranto sufficient.* Where a notary's certificate that an affiant had, on being duly sworn, stated on oath that he had heard read the affidavit and knew the contents thereof and that the matters and facts therein contained were true "except as to those matters and things therein stated to be on information and belief," etc., *held* that it was sufficient to sustain a petition for quo warranto, as by reference to the body of the affidavit the things so stated could have been easily ascertained.

Appeal from the Circuit Court of Ford county; the Hon. THOMAS M. HARRIS, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded with directions. Opinion filed April 16, 1917.

KERR & LINDLEY, for appellant.

SCHNEIDER & SCHNEIDER, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. JUSTICE GRAVES delivered the opinion of the court.

Appellant prepared what purported to be a petition to the Circuit Court of Ford county for leave to file an information in the nature of quo warranto, for the purpose of challenging the legality of a pretended election of a board of education in and for a pretended high school district known as the Sibley High School District, and for the further purpose of challenging the validity of the organization of the said pretended high school district and presented the same to appellant as State's Attorney of the said county of Ford and requested him to sign the same and to present the same to one of the judges of the Circuit Court of the district including the said county of Ford. That petition was accompanied by a purported affidavit of appellee in this case setting out various claimed defects in the attempted organization of said pretended district and in the said pretended election of a board of education. A paper in form an information in the nature of quo warranto was presented to appellant with said information. Appellant refused to sign and present to a judge of the Circuit Court the petition for leave to file the information, and appellee procured a writ of mandamus to issue, commanding appellant to

“receive said affidavit in support of petition of quo warranto aforesaid, that he sign the said petition for information in said cause as State's Attorney of Ford county, Illinois, and present the same to one of the judges of the 11th Judicial District, asking leave of said Judge to file an information in the nature of quo warranto against the said A. J. Casner, H. C. Zander, Edward Rudolph, Frank Elliott, W. R. Liddly, Thomas Christenson and P. J. Leenerman, and that he, the said O. H. Wylie, State's Attorney, as aforesaid, be ordered and commanded to do any and all acts in the premises, which unto law may appertain and as may be his duty as such State's Attorney in and about

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the securing leave from one of the Judges of the 11th Judicial District to file an information in the nature of a quo warranto as aforesaid."

Since this case was taken by this court the Supreme Court in *People v. Weis*, 275 Ill. 581, has held the entire act under which it was attempted to organize the school district in question to be void and of no effect.

Numerous reasons are urged by appellant why the judgment of the Circuit Court awarding the writ of mandamus is erroneous.

He first contends that admitting everything to be true that is stated in the so-called affidavit presented with the petition, still the petitioners have failed to show that they are legally entitled to the relief sought by reason of any private right which they are seeking to protect, and that in all cases where purely public rights are involved he, as a public officer, has an arbitrary discretion whether or not to present to the court such a petition.

In the view we take of this case, it is unimportant to determine whether the supposed facts relied on disclose a private right of petitioners to be enforced or whether the matters referred to relate to purely public rights, for in either event the action of appellant in refusing to sign and file the petition in question was warranted.

In *People v. Healy*, 230 Ill. 280, the Supreme Court said:

"By the common law the information in the nature of quo warranto was solely a prerogative remedy. No suit was ever prosecuted by that remedy at the instance of a private person, or for the assertion of a private right. It was used only where a wrong had been done, or was alleged to have been done, to the king, and it was therefore the rule that only the king, or his representative, should determine whether a suit should be brought to enforce the right of the king."

“The discretion possessed by the Attorney General at the common law is no doubt possessed by the Attorney General or State’s Attorney in all cases which are, in fact, prosecutions on the part of the people and which involve no individual grievance of the relator. * * * In cases, however, where the proposed relator has an individual and personal right, distinct from the right, if any, of the public, which is enforceable by a proceeding in quo warranto, and where he presents to the State’s Attorney a proper petition for his signature with evidence of the facts necessary to establish the right, it is the duty of that officer to apply for leave to file an information in the nature of a quo warranto, and if he refuses when the matter is properly presented to him, he may be compelled by mandamus to sign and file the petition for leave.

“The practice which may be followed by one who desires to become relator is to present to the State’s Attorney a petition addressed to the court, or to the judge thereof in vacation, for leave to file an information in the nature of a quo warranto, which petition should be so drawn as to be ready for filing when the signature of the State’s Attorney is thereto attached. As was suggested in *Cain v. Brown*, *supra* (111 Mich. 657), the affidavit or affidavits accompanying the petition must be full and positive and must be made by a person or persons knowing the facts, and be drawn in such a manner as that perjury may be assigned thereon if any material allegation contained therein is false. The affidavit or affidavits accompanying the petition, after being inspected by the State’s Attorney, should, in case he sign the petition, be presented with it for consideration by the court, or judge thereof, in determining whether to grant the leave asked.”

It follows that where only public rights are involved the State’s Attorney is clothed with an arbitrary discretion to present or refuse to present a petition of this character, and that when private rights are also, or only, involved then the affidavits presented with the petition must be made on knowledge and not on infor-

Brethorst v. Wylie, 205 Ill. App. 72.

mation and belief, must be full, complete and positive and so drawn that perjury can be assigned on them if found to be untrue. That leaves but one question to determine and that is whether the affidavit presented with the petition is sufficient to fill the requirements of the law.

There are at least two reasons why it is fatally defective. It does not purport to be made by a person who knows the facts, neither is it drafted in such a manner that it can be determined from it what part of it, if any, is intended to be on knowledge and what part is on information and belief, or that perjury could be assigned thereon. What the notary certifies was sworn to is as follows:

“State of Illinois)
“County of Ford} ss:

“Peter Brethorst, being first duly sworn upon his oath, deposes and says that he has heard read the above affidavit and knows the contents thereof and that the matters and facts therein contained are true except as to those matters and things stated on his information and belief and as to those he believes them to be true.”

It has been repeatedly held in this State that affidavits in substance the same as the foregoing were insufficient because no one can tell from them what is stated on the affiant's own knowledge and what is stated on information and belief. If that part of the affidavit had been “* * * except as to those matters and things *therein stated to be* on information and belief * * *” etc., then by referring to the body of the affidavit the things so stated could have been easily ascertained, but from the language employed in this affidavit no one except the affiant can tell which matters were stated from the personal knowledge of the affiant and which upon information and belief. On such an affidavit perjury could not be assigned. *Christian Hospital v. People*, 223 Ill. 244; *Grabarski v.*

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Stankowicz, 179 Ill. App. 45; *Von der Leck v. Baldwin County Colonization Co.*, 178 Ill. App. 93; *Schroth v. Siegfried*, 162 Ill. App. 595.

Instead of this record disclosing a clear right in the petitioner to have the relief sought, it shows a clear right in appellant to refuse to present to the court the petition for leave to file an information in the nature of quo warranto.

The order of the Circuit Court is reversed and the cause is remanded to that court with directions to deny the writ of mandamus.

Reversed and remanded with directions.

Adolph Scott Gorden, Appellant, v. Thomas J. Gorden and John M. Gorden, Appellees.

1. **APPEAL AND ERROR, § 123***—*when freehold involved.* When a will disposes of the fee of the testator's real estate, an appeal from an order of the Circuit Court refusing probate and dismissing the petition lies to the Supreme Court upon the ground that a freehold is involved.

2. **WILLS, § 146***—*when order admitting will to probate set aside.* Where a certain will disposing of the testator's real estate was probated without notice to a certain party claiming to be the testator's only son and heir, *held*, on petition by such party to set aside such probate, that if petitioner was the son of the testator the order admitting the will to probate must be set aside for want of jurisdiction in the court that entered the order.

3. **APPEAL AND ERROR, § 123***—*when freehold involved.* A petition by one claiming to be the only son and heir of a testator to set aside the probate of the testator's will disposing of the testator's real estate involves a freehold, and the Appellate Court is without jurisdiction to review an order dismissing such petition.

Appeal from the Circuit Court of Christian county; the Hon. WILLIAM B. WRIGHT, Judge, presiding. Heard in this court at the April term, 1917. Transferred to Supreme Court. Opinion filed May 1, 1917.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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W. B. McBRIDE, FRUMBERG & RUSSELL and BROWN-RIGG & MASON, for appellant.

J. E. HOGAN, S. S. CLAPPER and GEORGE T. WALLACE, for appellees.

PER CURIAM. This is an appeal by Adolph Scott Gorden from a judgment of the Circuit Court of Christian county denying and dismissing a petition filed by him to set aside the probate of the will of Randall R. Gorden, deceased. The case was heard by the Circuit Court on appeal by the petitioner from an order of the County Court of Christian county denying his petition. The appellees have made a motion to transfer the cause to the Supreme Court on the ground that a freehold is involved and therefore this court has no jurisdiction.

The petition alleges, among other grounds for setting aside the probate of the will of Randall R. Gorden, that the petitioner is the only son and heir of Randall R. Gorden and that he received no notice of the probate of the will. The answer filed on behalf of the executors admits that no notice was given to the petitioner and denies that the petitioner is a son of the deceased testator. The will devises certain real estate in fee to Thomas J. Gorden, a brother of the testator, and certain other real estate in fee to John M. Gorden, another brother.

When a will disposes of the fee of the testator's real estate, an appeal from an order of the Circuit Court refusing probate and dismissing the petition lies to the Supreme Court upon the ground that a freehold is involved. *More v. More*, 191 Ill. 97; *Senn v. Gruendling*, 218 Ill. 458. Section 21 of chapter 148 of the Statute (J. & A. ¶ 11563) requires that a petition for the probate of a will shall be verified and shall state the names of all the heirs at law and legatees with the place of residence of each, when known, and when unknown the

petition shall so state, and that the clerk shall mail notice to the parties where residence is known not less than twenty days prior to the hearing on the petition, and in certain cases the notice shall be published.

In *Mosser v. Flake*, 258 Ill. 233, it was held that if a party entitled to notice of a proceeding to probate a will receives no notice and does not appear or waive notice, the court is without jurisdiction to enter an order admitting the will to probate, and such order will be set aside and declared of no effect when the want of jurisdiction is called to the attention of the court. In that case a will disposing of real estate had been admitted to probate without notice to a legatee named in the will, whose interest was revoked by a codicil. Subsequently one of the executors filed a petition in the County Court to set aside the order admitting the instrument to probate on the ground that no notice of the proceeding for probate had been given to such legatee, and the legatee had neither appeared nor waived notice. The County Court denied the petition. On appeal to the Circuit Court the petition was again denied. The cause was then appealed to the Supreme Court, which held that the County and Circuit Courts erred in not vacating the order admitting the instrument to probate since they were without jurisdiction because the statutory notice had not been given.

If petitioner is a son of the said Randall R. Gorden, then the order admitting the alleged will to probate must be set aside for want of jurisdiction in the court that entered the order, and the order of probate being vacated affects the title to the real estate devised to appellees. A freehold is involved and this court is without jurisdiction in the matter and the cause is transferred to the Supreme Court.

Transferred to Supreme Court.

CASES
DETERMINED IN THE
SECOND DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1917.

A. L. Pulver and J. H. Kohlman, trading as Pulver-Kohlman Land Agency, Appellees, v. Harry Ainsworth, Appellant.

Gen. No. 6,263. (Not to be reported in full.)

Appeal from the City Court of Moline; the Hon. GEORGE O. DIETZ, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed February 10, 1917. Rehearing denied April 12, 1917.

Statement of the Case.

Action by A. L. Pulver and J. H. Kohlman, trading as Pulver-Kohlman Land Agency, plaintiffs, against Harry Ainsworth, defendant, to recover commissions claimed for services rendered in arranging a contract between defendant and R. and G. A. Shallberg to trade and exchange certain real estate. From a judgment for plaintiffs for nine hundred and eighty dollars, defendant appeals.

Pulver et al. v. Ainsworth, 205 Ill. App. 80.

GEORGE W. WOOD, for appellant.

DIETZ & SINNETT, for appellees.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. **BROKERS, § 93***—*what are questions for jury in action by members of real estate partnership individually for commissions.* In an action by two plaintiffs doing business as a real estate partnership agency to recover commissions claimed for arranging a contract between the defendant and others for the exchange of defendant's real estate, the questions whether there was a misjoinder of plaintiffs and whether plaintiffs were acting in a dual capacity as agents for both parties to the contract, *held* to be for the jury.

2. **BROKERS, § 91***—*when evidence sufficient to show knowledge by owner that members of real estate partnership were acting for both parties.* Evidence *held* sufficient to sustain the finding that plaintiffs were acting as a partnership in the transaction sued on and that defendant knew they were acting both for him and for the other party to the contract involved in such transaction for the exchange of defendant's real estate, in an action to recover commissions claimed on account of such transaction.

3. **APPEAL AND ERROR, § 1525***—*when instruction in action by brokers for commissions for exchange of real estate not reversibly erroneous.* In an action to recover commissions claimed for securing a contract for the exchange of defendant's real estate, where plaintiffs were acting for both parties to such contract, an instruction that before plaintiffs could recover they must show that defendant had knowledge that they were acting for and were to recover commissions from both parties, *held* to be erroneous in omitting the necessary requirement also that defendant had agreed to plaintiffs so acting in a dual capacity, but not reversibly erroneous where other instructions covered the point, and the jury could not have been misled.

4. **INSTRUCTIONS, § 154***—*when modification proper.* Modification of a requested instruction, making it more clear, where it was vague as originally drawn, *held* to be proper.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Furst v. W. T. Rawleigh Medical Co., 205 Ill. App. 82.

Frank E. Furst, Appellee, v. W. T. Rawleigh Medical Company et al., Appellants.

Gen. No. 6,130.

1. APPEAL AND ERROR, § 1733*—*when prior decision of Appellate Court is conclusive as to right of stockholder to examine books of corporation.* On a petition by a stockholder of a corporation for mandamus to compel the corporation and its officers to admit petitioner to its principal office and place of business to examine its records and books of account, where the defendants' answer set up a former adjudication wherein an order was entered for one complete examination by petitioner of the corporation's financial affairs, *held* that a demurrer to the answer was properly sustained, as petitioner had by such examination exhausted his rights under such order.

2. CORPORATIONS, § 178*—*when improper motives of stockholder are not bar to right of inspection of books.* The existence of improper motives in a stockholder of a corporation seeking mandamus to compel the corporation and its officers to admit him to an examination of its records and books of account is no bar to the exercise of his rights as a stockholder.

3. CORPORATIONS, § 178*—*what records and books stockholder not permitted to examine.* On petition by a stockholder in a medical company for mandamus to compel the company and its officers to allow him to make an examination of its records and books of account, *held* that the order for mandamus should except from its operation the report register of salesmen, the correspondence and contracts with salesmen, and the formulas and secret processes of manufacturing preparations sold by the company.

4. CORPORATIONS, § 178*—*when stockholder permitted to examine records and books.* An order for mandamus to compel a corporation and its officers to allow a stockholder to make an examination of its records and books of account should restrict such examination to business hours.

5. CORPORATIONS, § 178*—*when right of stockholder to examine records and books ceases.* An order for mandamus to compel a corporation and its officers to allow a stockholder to make an examination of its records and books of account should provide that it shall cease to be effective whenever the stockholder ceases to be a stockholder of the corporation.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Furst v. W. T. Rawleigh Medical Co., 205 Ill. App. 82.

Appeal from the Circuit Court of Stephenson county; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the April term, 1915. Affirmed in part, reversed in part and remanded with directions. Opinion filed February 10, 1917. Rehearing denied April 12, 1917.

R. R. TIFFANY and **C. E. CRUIKSHANK**, for appellants.

LOUIS H. BURRELL and **HAROLD D. JAMES**, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

On November 20, 1914, Frank E. Furst filed in the Circuit Court of Stephenson county a petition against W. T. Rawleigh Medical Company and certain of its officers for a mandamus against said company and said officers, commanding them to admit the petitioner to its principal office and place of business at Freeport at all reasonable times to examine the records and books of account of the company, his alleged right to that relief being based on the fact that he then was and since August, 1905, had been a stockholder therein. The defendant company and its president and treasurer demurred to said petition and that demurrer was overruled. Jackson, the secretary of said company, answered the petition and the petitioner demurred thereto and that demurrer was sustained. The other defendants refused to plead further and the defendants who had demurred to the petition elected to stand by their demurrers, and Jackson elected to abide by his answer. A peremptory writ of mandamus was ordered, commanding the defendants to admit the petitioner in person or by his attorney to the principal office or place of business of the company in Freeport at all reasonable times and to make examinations of the records and books of account of said company and

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to give said petitioner or his attorney access to the records and books of account of the company. This is an appeal from that order. The answer of Jackson set up at great length that Furst was a rival in business and was using the information obtained from the company's books to steal its methods and its salesmen and its customers, and also said answer pleaded the proceedings set out by us in *Furst v. Rawleigh*, 154 Ill. App. 522, as a prior adjudication. We held that the facts set up in said answer did constitute a former adjudication and that the demurrer to the answer of Jackson should have been overruled, and we reversed and remanded the cause. Thereafter we granted a rehearing to re-examine the question of former adjudication.

Upon a further consideration of the former judgment, set out in full in said answer, we find that by a reasonable construction thereof it is confined to one complete examination of the financial condition of the corporation. It appears from the allegations of said answer that Furst made one examination of the books of the company and it is a reasonable construction of the proceedings that he thereby exhausted his rights under that order. We therefore conclude that the former judgment could not be resorted to by petitioner to procure another examination, and that therefore the court properly sustained a demurrer to the answer so far as the question of former adjudication was concerned. The answer further indicated that Furst used the former order and will use the present judgment, not only for the legitimate purpose of exercising his right as a stockholder to ascertain the financial condition of the company, but also to gain knowledge to be used by him as a rival, to the detriment of the company. We conclude, however, that the existence of improper motives will not bar him from the exercise of his rights as a stockholder and that the judgment in the main is right.

We conclude, however, that the order is too broad. We conclude that the order should be so amended and qualified as to except from its operation and from such examination the report register of salesmen, the correspondence and contracts with salesmen, and the formulas and secret processes of manufacturing preparations sold by the company, and that the right to examine should be so modified as to restrict it to business hours, and that the judgment should provide that it shall cease to be effective whenever Furst ceases to be a stockholder of the corporation. The costs here will be adjudged against the appellee.

The judgment is therefore affirmed in part and reversed in part at the costs of appellee, and remanded with directions to modify the judgment in conformity with this opinion.

Affirmed in part, reversed in part and remanded with directions.

**Thomas Sage, Administrator, Defendant in Error, v.
W. O. Johnson, Receiver, Plaintiff in Error.**

Gen. No. 6,324.

1. CARRIERS, § 476*—*when evidence sufficient to show negligence of motorman and due care of intending passenger. Evidence held sufficient to warrant the finding that the motorman operating defendant's interurban car was negligent and that plaintiff's intestate was in the exercise of due care for his own safety at the time he was struck by said car, which was while crossing the track to the platform to take the car, on its arrival.*

2. TRIAL, § 195*—*when direction of verdict improper. Where there was some evidence tending to show defendant was negligent and that plaintiff's intestate was in the exercise of due care when he was struck and killed by defendant's interurban car, held that*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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a directed verdict for the defendant was properly refused, in an action to recover damages on account of intestate's death.

3. CARRIERS, § 482*—*when instruction in action for death of intending passenger killed by street car is erroneous.* An instruction, in an action to recover damages for loss to the next of kin of an intestate killed by defendant's interurban car while crossing the track to the platform to take the car, on its arrival, that the place where the accident occurred was not within an incorporated city and that there was no ordinance or law restricting the speed of cars as they approached such place, *held* to be erroneous where neither the pleadings nor the evidence referred to any ordinance or statute, and the question of the propriety of the speed of the car depended on the facts concerning the motorman's duty to stop at such place because of a prevailing custom and the signals and presence on the platform there of a person, which facts the instruction ignored.

4. INSTRUCTIONS, § 482*—*when instruction singling out facts is erroneous.* An instruction which singled out one particular fact and stated that that fact alone and of itself was not evidence of negligence of defendant's motorman, in an action to recover damages for loss to next of kin of plaintiff's intestate killed by defendant's interurban car operated by such motorman, *held* to be erroneous.

5. CARRIERS, § 482*—*when instruction in action for death of intending passenger properly refused.* In an action to recover damages for loss to next of kin of plaintiff's intestate killed by defendant's interurban car while crossing the track to the platform to take the car, on its arrival, an instruction that if intestate knew the car was coming in time to avoid being struck by it, it made no difference whether or not the motorman of the car sounded the whistle for the crossing where the intestate was struck by the car, *held* properly refused, as it ignored the evidence tending to show that the intestate had a right to expect the car would stop before it reached the crossing.

Error to the Circuit Court of Lake county; the Hon. CLAIRE C. EDWARDS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed February 10, 1917. Rehearing denied April 12, 1917.

BULL & JOHNSON and CHARLES H. KING, for plaintiff in error.

C. HELMER JOHNSON and JAMES G. WELCH, for defendant in error; ARTHUR H. CHETLAIN, of counsel.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. JUSTICE DIBELL delivered the opinion of the court.

James Sage was killed on a highway crossing by an interurban car operated by plaintiff in error. Sage's administrator brought this suit against the receiver of said interurban line to recover damages for the loss to the next of kin, and on a jury trial had a verdict and a judgment of \$1,000. The receiver brings the judgment here for review by writ of error and contends that the evidence did not warrant the jury in finding that the deceased was in the exercise of due care nor that the motorman running the car was negligent, and that therefore the court should have directed a verdict for the receiver; and that the court erred in refusing certain instructions requested by the receiver.

The Chicago & Milwaukee Electric Railroad Company has a branch line running from Lake Bluff west to Rockefeller. Libertyville is the only regular station between the termini of the branch road, but it stops on signal at various highway crossings. Something like two miles east of Libertyville the road is crossed by a north and south highway, and that is called St. Mary's crossing. The road has a double track. At St. Mary's crossing there is an elevated platform and a small station building on the south side of the tracks, and a platform one step high opposite that on the north side. Eastbound cars go by on the south track and westbound on the north track. This branch road operates but one car, which leaves Lake Bluff on the even hour and Rockefeller on the even half hour. The platforms at St. Mary's crossing are east of the highway. The car stops at one of those platforms if signaled by the conductor to permit any one to leave the car, and also if any one on the platform from which the car is entered signals the car, and the presence of a person on the platform is itself a signal to stop. On Sunday evenings the car usually stops at St. Mary's

crossing, and this accident happened on a Sunday evening. James Sage, seventy-nine years old, and his wife had come from Libertyville that afternoon and got off at that crossing and had gone south to visit relatives, and had come back in a sleigh with a team driven by a grandson, George T. Hoffman, to take the evening car to Libertyville. When they reached the crossing the car was coming over a hill at the east and the headlight shone upon the wires and the leaves of trees above them. Hoffman turned his team up to a telegraph pole south of the tracks and called out that he would signal the car and ran ahead and across the tracks and east onto the platform on the north side, which was where the car would take on passengers going to Libertyville. The old people got out of the sleigh and hurried across. Hoffman was on the platform before the car got to the top of the hill and stood there and signaled as it came down. The top of the hill was twelve hundred to fourteen hundred feet from the platform. The car was running from thirty-five to forty miles per hour, and after it had begun to go down hill the motorman shut off the power and coasted down hill. He did not see Hoffman until the car was very near the platform, and he then discovered the old people on the track ahead of him, just going across, and gave the danger signal after the front of the car had passed Hoffman. Mr. and Mrs. Sage were struck and killed, and the car ran some distance beyond St. Mary's crossing before the motorman could stop it. The jury were warranted in finding that Hoffman was signaling the car from the time it reached the top of the hill, and that the motorman for some reason did not see him. The track was straight. It is sought to excuse the motorman because the track passed through a cut, and it is claimed that the rays of the headlight were directed straight down the track and did not reach out at the side. When it is considered that this car usually stopped at this place on Sun-

day evenings, and that the motorman had a right to expect that some one might be on that platform, signaling to stop, and that Hoffman was there when the car was at least twelve hundred feet east thereof, and was signaling, and that the car had a brilliant headlight, shining ahead, and that the motorman did not discover Hoffman until he was almost opposite him, and did not see the old people crossing the south track, or until they were right in front of him on the north track, the jury might well find from all the evidence that the motorman was negligent in running the car as he did. The principal effort of the defense was to show that Sage must have seen this car coming before he got to the tracks and especially before he got upon the north track, and therefore was guilty of such negligence as precludes recovery. There would be much force in this argument if this was a place where the car did not stop. Sage had often come to this place and alighted there from Libertyville, and again taken the car there to return to Libertyville. So far as the evidence shows, the cars he knew of always did stop there. He knew that Hoffman had gone ahead to signal the car. As he approached the crossing from the south he was in full view of Hoffman standing on the north platform signaling the car. He had every reason to expect that the car would stop before it reached the highway. The fact that the car was in sight would not lead him to fear that it was going across the highway. The power had been shut off a long ways east of this crossing and if that made any difference in the sound of the approaching car he would naturally suppose it was stopping. The jury might well conclude that he could not tell the speed of the car as it came directly towards him. These were questions of fact for the jury, and it was for them to decide whether Sage was in the exercise of due care for his own safety in hurrying over the north track to the platform under

Sage v. Johnson, 205 Ill. App. 85.

these circumstances. We would not be justified in disturbing their conclusion. As there was evidence tending to show negligence by defendant and due care by deceased, the court properly refused to direct a verdict for defendant. *Libby, McNeill & Libby v. Cook*, 222 Ill. 206.

Complaint is made of the refusal of instructions Nos. 14, 17, 18 and 19, requested by defendant. No. 14 was covered by No. 12, given at defendant's request. No. 17 was to the effect that St. Mary's crossing was not within the limits of any incorporated city and that there was no ordinance or law restricting the speed of the car as it approached the crossing. No ordinance or statute had been referred to in the pleadings and no evidence was offered of any such ordinance or statute, and there was no propriety in giving such an instruction. Moreover, the question of the propriety of the speed of this car at this crossing depended on the facts concerning the duty of the motorman to stop because of the prevailing custom and the signals and the presence of a person on the platform, and these were ignored in the instruction. The eighteenth instruction singled out one particular fact and said that that fact alone and of itself was not any evidence of negligence on the part of the motorman. Instructions of this character have often been disapproved. The reasons therefor are stated in *West Chicago St. R. Co. v. Petters*, 196 Ill. 298; and *Weston v. Teufel*, 213 Ill. 291. See also, *Healea v. Keenan*, 244 Ill. 484, and *Geohegan v. Union Elev. R. Co.*, 266 Ill. 482. The nineteenth instruction was to the effect that if Sage knew the car was coming in time to avoid being struck by it, then it made no difference whether or not the whistle was sounded for St. Mary's crossing. This instruction was properly refused because it ignored the evidence tending to show that Sage had a right to expect that the car would stop before it reached the

crossing. It was also properly refused under *Chicago & A. R. Co. v. Smith*, 180 Ill. 453, where the court said:

“Even if he did see the train, we are not prepared to say that the question as to whether the failure to give the signal caused the injury was not one to be submitted to the jury. Under some circumstances, if one approaching a railroad crossing sees a train coming, the ringing of a bell or sounding of a whistle would accomplish no purpose, while under other circumstances such a signal might so arrest the attention and apprise him of the danger as to prevent his attempting to cross the track.”

We find no reversible error in the record and the judgment is therefore affirmed.

Affirmed.

The People of the State of Illinois, Defendant in Error, v. William McCanney, Plaintiff in Error.

Gen. No. 6,331.

1. INTOXICATING LIQUORS, § 127*—*when refusal of court to require bill of particulars is not error.* On a prosecution for selling intoxicating liquors in anti-saloon territory, the refusal of the court to require a bill of particulars as to the kinds and brands of such liquors alleged to have been sold, by whom sold, whether by principal or agent, and further describing the premises where they were sold, *held* not erroneous.

2. INDICTMENT AND INFORMATION, § 45*—*when State required to furnish bill of particulars.* The question whether the State should be required to furnish a bill of particulars and the character of such bill, in a criminal prosecution, *held* to rest in the sound legal discretion of the trial court.

3. CRIMINAL LAW, § 495*—*when decision of court in refusing to require bill of particulars not disturbed.* Refusal of a trial court to require a bill of particulars in a criminal prosecution will not be disturbed unless it appears the defendant could not properly

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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prepare his defense without such bill or was injured by the failure to furnish it.

4. CONTINUANCE, § 71*—*when motion of defendant for in criminal case properly denied.* Where the defendant in a criminal prosecution for selling intoxicating liquors in anti-saloon territory did not ask for a bill of particulars until the time of trial and a month or more after he had been in court, *held* that his motion for a continuance to allow him opportunity to see and investigate the witnesses whose names were then furnished him by such bill and who lived in other cities was properly denied.

5. INTOXICATING LIQUORS—*who are legal voters at election.* Women are legal voters at an election under the act providing for anti-saloon territory.

6. PLEADING, § 432*—*what is office of a videlicet.* The office of a *videlicet* is to indicate that the pleader does not undertake to prove the precise circumstances alleged.

7. PLEADING, § 432*—*when rule as to videlicet inapplicable.* The rule that a *videlicet* indicates the pleader does not undertake to prove the precise circumstances so alleged does not apply to a *videlicet* which is material to the charge.

8. INTOXICATING LIQUORS, § 117*—*when date of sale of may be alleged under a videlicet.* In a prosecution for selling intoxicating liquors in anti-saloon territory, the date of a sale is not material, provided it was after the date the territory became anti-saloon and before the date of filing the information, and may be alleged under a *videlicet*.

9. WITNESSES, § 267*—*what weight should be given to testimony of a detective.* The testimony of a detective is to be treated like that of any other witness, and his interest, if any, in securing compensation from and success for his employer is to be considered the same as the interest of any other witness, and the jury are judges of whether he shall be believed.

10. INTOXICATING LIQUORS, § 150*—*when proof of intoxicating quality unnecessary.* Proof that the defendant sold spirituous, vinous or malt liquors is sufficient to sustain a conviction under the anti-saloon law without proving their intoxicating quality.

11. INTOXICATING LIQUORS, § 150*—*when proof of intoxicating quality necessary.* To sustain a conviction under the anti-saloon law for selling liquors not named in the law there must be proof of their intoxicating quality.

12. INTOXICATING LIQUORS—*what is question involved in prosecution for sale of malt liquors.* If a statute forbids the sale of malt liquors, it is only necessary in a prosecution thereunder to determine whether the liquors sold were malt.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

13. INTOXICATING LIQUORS, § 129*—*what judicial notice taken of.* Courts take judicial notice in a criminal case that whisky is a spirituous liquor.

14. INTOXICATING LIQUORS, § 144*—*when witnesses competent to testify as to quality of intoxicating liquor.* Certain witnesses held competent to testify whether certain liquors drunk by them were intoxicating liquors or malt liquors or whisky, where their testimony showed they could tell the character and quality of what they drank by drinking it.

15. INTOXICATING LIQUORS, § 145*—*when intoxicating quality of is question for jury.* Where the evidence was conflicting in a criminal case as to whether certain liquors sold by defendants and drunk by a certain witness were intoxicating or malt or whisky, held that the question was for the jury.

16. INTOXICATING LIQUORS, § 131*—*when evidence of lack of knowledge of intoxicating quality by seller is incompetent.* In a prosecution for selling intoxicating liquors in anti-saloon territory, evidence tending to show the defendant did not know the liquors sold by him were intoxicating, held not competent, as in cases of this character the defendant's intention is immaterial.

17. INTOXICATING LIQUORS, § 112*—*when former prosecution no defense.* A conviction for violation of a city ordinance as to selling intoxicating liquors, held to be no defense to a prosecution for violation of the anti-saloon law.

18. CRIMINAL LAW, § 452*—*what must appear in bill of exceptions.* In the absence of an order of court appearing in the record of the court that the jury in a case were to be kept together during trial, held that fact could only be shown, if at all on review, by the certificate of the court in the bill of exceptions.

19. CRIMINAL LAW, § 444*—*what must appear in bill of exceptions.* What was done by the court in a criminal case must be shown by the bill of exceptions containing a statement by the trial judge to that effect, and cannot be shown by an affidavit, but such affidavit must be disregarded.

20. CRIMINAL LAW, § 109*—*what is nature of offense of selling liquor in anti-saloon territory.* Violation of the statute relating to selling intoxicating liquor in anti-saloon territory is a misdemeanor merely.

21. CRIMINAL LAW, § 321*—*when jury may separate.* In misdemeanors it is not error for the jury to separate.

22. INTOXICATING LIQUORS, § 150*—*when evidence sufficient to sustain conviction for illegal sale.* In a prosecution for selling intoxicating liquors in anti-saloon territory, evidence held to make a case under the twenty-four counts of the information.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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23. INTOXICATING LIQUORS, § 161*—*when judgment excessive for illegal sale in anti-saloon territory.* Fines of \$75 on each of twenty-two counts and \$100 on each of two counts of an information for violation of the statute relating to selling intoxicating liquors in anti-saloon territory, *held*, to be excessive, where the information was filed soon after that law went into force in that territory and there was no direct proof of any sales to any residents of the territory or other than to two detectives resident elsewhere.

24. INTOXICATING LIQUORS, § 161*—*when fines reduced and judgment modified.* Where the fines assessed for violations of the statute for selling intoxicating liquors in anti-saloon territory were excessive, *held* that such fines should be reduced and judgment modified accordingly.

Error to the County Court of Lake county; the Hon. PERRY L. PERSONS, Judge, presiding. Heard in this court at the October term, 1916. Modified and affirmed. Opinion filed February 10, 1917. Re-hearing denied April 12, 1917.

P. L. JORGENSEN, for plaintiff in error.

JAMES G. WELCH, JOHN W. WELCH, RALPH J. DADY and E. M. RUNYARD, for defendant in error; W. F. WEISS, of counsel.

MR. JUSTICE DIBELL delivered the opinion of the court.

On June 19, 1916, the State's Attorney of Lake county filed an information in the County Court against William McCanney, charging him with the unlawful sale of intoxicating liquor in the Town of Waukegan in said county, while it was anti-saloon territory. The information contained forty-one counts. He was tried by jury and found guilty under each. Afterwards, the State dismissed seventeen of said counts and under the other counts he was fined an aggregate of \$1,850, was sentenced to imprisonment in the county jail for fifty days in all, and it was ordered that the place which he kept should be abated as a nuisance until he gave the bond required by statute,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

and he afterwards gave such a bond and it was approved. At about the same time five other informations were filed in the same court, containing like charges against five other defendants and there were trials and convictions, and those cases are here for review, under general numbers 6332, 204 Ill. App. 124; 6333, 6334, 6335 and 6336, *post*, pp. 104, 105, 106 and 107. In each case the last count charged the keeping of a nuisance and sought its abatement, and in each case the State, by leave of court, filed an amended last count to correct the description of the premises sought to be abated. The same counsel appear in each case and the main contentions of each brief are the same, there being in each brief a few pages devoted specially to that particular case. Most of the contentions of the respective plaintiffs in error will be disposed of in this opinion.

In each case the defendant applied for a bill of particulars. The State complied in part with the application by furnishing the street addresses and places of residence of the witnesses whom the people would call, except those living in Waukegan, who would be called to prove that it became anti-saloon territory. The court, however, refused to require the State to set forth in a bill of particulars the kinds and brands of intoxicating liquor alleged to have been sold by the defendant, and to state by whom the liquor was sold, and whether the party selling was principal or agent, and to further describe the place where the liquor was sold. In each case the defendant claims that this refusal was reversible error, and relies largely upon what we said and the authorities we cited in *Gilmore v. People*, 87 Ill. App. 128. That was a conspiracy to obtain money by false pretenses and by the confidence game. In support of the application it was shown that the alleged conspiracy as to the other defendants had proceeded for some thirty days and many of the acts relied upon to show guilt had been

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performed before Giltmore had any connection with the matter, or had ever even known or seen any of the parties to the transaction, and he became acquainted with the matter only nine days before the completion of the alleged conspiracy. The language used is to be considered in connection with those facts. Here, each defendant knew better than the State possibly could what liquors he sold at his place of business and what clerks or assistance he employed, and he needed no information from the State on those subjects, and the back of the indictment gave him the names of those to whom the State would claim sales had been made, and the State then furnished to defendant the addresses of those witnesses. Since the *Giltmore* case, *supra*, was decided, numerous later cases have somewhat modified the rule we there laid down, as we held in *People v. Brown*, 150 Ill. App. 365; *People v. Walker*, 154 Ill. App. 3; *People v. Maas*, 154 Ill. App. 11, all of which were prosecutions for the illegal sale of liquor. Since the cases which we there cited, it has been held in *People v. Smith*, 239 Ill. 91; *People v. Nall*, 242 Ill. 284; *People v. Poindexter*, 243 Ill. 68; and *People v. Gray*, 251 Ill. 431, that the question whether the State should be required to furnish a bill of particulars, and the character of such bill, rests in the sound legal discretion of the trial court, and that its refusal will not be error, unless it is made to appear that the defendant could not properly prepare his defense without such a bill or that he was injured by the failure to furnish it. We are of opinion that the court did not err in this case on that subject.

In the present case, after information was furnished in answer to the request for a bill of particulars, defendant moved for a continuance because he had not had an opportunity to see and investigate the witnesses for the People, whose places of residence had just been furnished him and who lived in Chicago and Bloomington. Defendant did not make this applica-

tion for a bill of particulars until the day the case was called for trial. He had been in court for a month or more and could not delay the trial by waiting that long before asking for this information.

In one or more of the cases, during the impanelment of the jury, defendant's attorney asserted that jurors were being called who had worked for the success of the proposition to make that anti-saloon territory at the recent election. He did not offer any proof of this statement, and, if the examination of the jurors showed it, he did not incorporate such showing in his abstract. In one or two of the other cases other rulings in the impanelment of the jury are complained of. The abstracts do not show that any defendant exhausted his peremptory challenges or had an unfair juror put upon him or was injured by the rulings of the court in impaneling the jury.

Although defendants concede in their briefs that the City of Waukegan is located in the Town of Waukegan and that it became anti-saloon territory on May 4, 1916, yet they also contend that the court erred in not requiring the State, in introducing the certificate of the clerk showing the election and the result thereof, to show separately the vote of the women and the vote of the men on that proposition, and in one of the cases the defendants proved the number of male voters and the number of female voters who voted for and against said proposition, and thereby showed that it was carried only by the vote of the women; and it seems to be contended that the women were not competent to vote on that subject and therefore the City of Waukegan was not in anti-saloon territory. The act providing for anti-saloon territory requires the proposition to be submitted to the legal voters of the political subdivision to be affected thereby. The Act of June 26, 1913, granting to women the right to vote in certain cases, authorizes them to vote upon proposi-

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tions submitted to a vote of the electors of cities, villages and towns and other political divisions of the State. In *Scoun v. Czarnecki*, 264 Ill. 305, it was held that said act is constitutional, so far as it relates to propositions submitted at a referendum election, which are not provided for in the Constitution, but only in the statute. The proposition to make a municipality anti-saloon territory is not provided for in the Constitution but only in the statute, and therefore women are legal voters at such an election.

In some of these cases there was a variance between the dates alleged in the counts of the information and the dates when sales were proved, and it is alleged that such variance is fatal. All the dates of alleged illegal sales stated in the information were laid under a *videlicet*. The office of the *videlicet* is to indicate that the pleader does not undertake to prove the precise circumstances alleged. 2 Bouvier's Law Dictionary, title "*Videlicet*"; *Rose v. Mutual Life Ins. Co.*, 144 Ill. App. 434. This rule does not apply if the matter stated under a *videlicet* is material to the charge. Here, the date of the sale was not material to the charge, provided it was after the city became anti-saloon territory and before the information was filed. There was therefore no error in that respect.

The evidence of illegal sales of intoxicating liquor introduced by the State was the testimony of two men who called themselves "investigators." They were in the employ of an organization to enforce the liquor laws of the State at a certain price per day and their expenses. They were sent to Waukegan and placed themselves under the direction of the State's Attorney. They were brothers. They rented a room in which to live, and then proceeded under the direction of the State's Attorney to visit frequently various places in the city where soft drinks were claimed to be sold by men who had kept saloons at those respective

places before the city became anti-saloon territory. One of these investigators engaged in some kind of work. They called for and obtained various kinds of drinks and drank them, and played cards and gambled, and came to the various places from time to time. One of them carried a bulb syringe in his pocket and one or more empty bottles. One of them would manage to lower his glass or bottle below the table and fill a syringe from it, or he would go to the toilet carrying a bottle of liquor he had purchased and there with his syringe take out a part of it and place it in an empty bottle in his pocket. They would then return to their room, seal up this bottle and mark it so as to distinguish it from other bottles, and one of them would set down in a book they kept, memoranda showing what liquor they had called for at each place, and the character of what they had obtained. The other one saw the entries that were made. Afterwards they delivered these samples to a chemist at the Wesleyan University at Bloomington who analyzed the contents of the several bottles and testified what kind of liquor they were and what proportion of alcohol they contained. Before each trial these investigators or detectives refreshed their recollection from the minutes they had made in the book they kept, and from their recollection, so refreshed, each gave testimony in which he stated the number of drinks he had purchased and drank at each particular place on each particular day and his opinion of the character of the liquor they drank, as, that it was malt liquor, or that it was cider with whisky in it, or that it was intoxicating. It is contended that the jury should not have believed these detectives and that this court should not believe them. We expressed our views on this subject in *People v. Gardt*, 175 Ill. App. 80 (affirmed in 258 Ill. 468); and in *People v. Sehrer*, 196 Ill. App. 442; and *People v. Fichter*, 196 Ill. App. 516. The true rule we held to

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be that the testimony of a detective is to be treated like that of any other witness, and his interest, if any, in securing compensation from and success for his employer is to be considered the same as the interest of any other witness, and that the jury are the judges of whether he shall be believed. See also, *Hronek v. People*, 134 Ill. 139; *People v. Campbell*, 234 Ill. 391.

The act relating to anti-saloon territory makes it unlawful to sell intoxicating liquor in such territory, and section 1 of said Act (J. & A. ¶ 4637) provides that the term "intoxicating liquor" shall include all distilled, spirituous, vinous, fermented and malt liquors. Proof of the sale of pop and that it was a malt liquor was held to justify a conviction in *Godfriedson v. People*, 88 Ill. 284. Proof of the sale of cider is not sufficient to convict, but if the proof also shows that it intoxicated those who drank it, then a conviction is authorized. *Hertel v. People*, 78 Ill. App. 109. If it is proved that defendant sold spirituous, vinous or malt liquor, that is sufficient to sustain a conviction without proving their intoxicating quality, but as to liquors not named in the statute, it must be proved that they are intoxicating. *Hewitt v. People*, 186 Ill. 336. If a statute forbids the sale of malt liquor, it is only necessary to determine whether the liquor sold was a malt liquor, and its intoxicating properties need not be shown. 23 Cyc. 57-64; *State v. Cummings* (Iowa), 2 L. R. A. 408. Courts take judicial notice that whisky is a spirituous liquor. 16 Cyc. 856, note. It is contended that the court erred in permitting the detectives to testify that certain liquid which they drank in the places of these several defendants was intoxicating liquor or malt liquor or whisky. We are of opinion that they showed by their testimony that they could tell the character and quality of what they drank by drinking it, and that a sufficient foundation was laid for the introduction of their opinion. It

was held in *Com. v. Timothy*, 8 Gray (74 Mass.) 480, that it is competent to permit a witness to testify that a certain liquor is a malt liquor. The defendants offered proof in several of these cases to show that what the detectives drank and what the defendants sold was not intoxicating, nor whisky nor a malt liquor. That left a question of fact for the jury to determine, and in the present case we see no reason to differ from their conclusion.

In some of the cases the defendant succeeded in proving that he supposed or had been assured that what he sold was not intoxicating but, in other instances, that proof was kept out, and the attorney for one defendant was not permitted to state to the jury that he would introduce evidence tending to show that defendant supposed that the drinks he sold were not intoxicating. In cases of this character the intention of the defendant is not material and therefore this proof was not competent nor a defense. *McCutcheon v. People*, 69 Ill. 601; *Farmer v. People*, 77 Ill. 322; *Maguire v. People*, 219 Ill. 16; *People v. Nylin*, 139 Ill. App. 500, and 236 Ill. 19. The jury could only decide the question of guilt or innocence and had nothing to do with the punishment.

In the present case, defendant alleges that he proved a former conviction for the same offense. This is not a correct statement of the evidence. The alleged former conviction was before a justice of the peace on May 17, 1916, and was for a violation of a city ordinance. All proof in this case was of sales at a later date, and a conviction for violation of a city ordinance would not be a defense to a prosecution for a violation of the statute here involved.

Complaint is made of remarks by the court in the presence of the jury in rulings upon the evidence. We do not find reversible error in them. It is to be noted that frequently where the court overruled an objection

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by defendant to a question, the answer is not given in the abstract.

In one of these cases, in support of a motion for a new trial, an affidavit was filed which stated that the court ordered the jury to be kept together during the trial and that in violation of that order one juror went to Chicago after the court adjourned at night and returned later in the evening, and it is urged that this was a violation of defendant's rights. We are unable to find either in the abstract or in the record any order requiring the jury to be kept together. In the absence of any order appearing in the records of the court, that fact could only be shown, if at all, by the certificate of the court in the bill of exceptions. What was done by the court must be shown by the bill of exceptions containing a statement to that effect by the trial judge, and cannot be shown by an affidavit, and such affidavit may be disregarded. *Mayes v. People*, 106 Ill. 306; *Peyton v. Village of Morgan Park*, 172 Ill. 102; *Deel v. Heiligenstein*, 244 Ill. 239; *People v. Strauch*, 247 Ill. 220. We so held in *Tindall v. Chicago & N. W. Ry. Co.*, 200 Ill. App. 556, in which case the Supreme Court denied a certiorari. Such an affidavit was considered in the very recent case of *People v. King*, 276 Ill. 138, but its competency was apparently not questioned by counsel. The authorities we have above cited were not referred to and we do not think they should be considered as overruled by implication. Moreover, these are misdemeanors merely, and in misdemeanors it is not error for the jury to separate. Even in felonies not capital, it is not error for the jury to separate. *Sutton v. People*, 145 Ill. 279. It is not shown that defendant was harmed in any way by the fact that the juror went to Chicago.

In this case the judgment rests upon twenty-four counts, including the last or "nuisance" count. Besides sales of malt liquor, there was proof of some

thirty-seven sales of ginger ale and whisky combined, and the chemist testified that he analyzed one of the samples of the latter furnished him by one of the detectives and found that it contained 14.18 per cent. of alcohol by volume. This proof made a case under the twenty-four counts. One of defendant's witnesses testified that he saw one of the detectives putting whisky in the ginger ale. Others testified that the buck, etc., which they drank at defendant's place was not a malt liquor. A chemist testified that he analyzed buck in Chicago furnished him by the company which sold this drink to the defendant, and that the buck he so analyzed was not a malt liquor. None of this was proved to be the same liquor or from the same receptacle from which defendant sold drinks to the detectives. We would not be warranted in saying that the jury should have believed defendant's witnesses and should have disbelieved those for the State.

By the judgment of the court defendant was fined \$75 on each of the counts numbered 1 to 5 inclusive, 9 to 12 inclusive, 27 to 39 inclusive, and \$100 on each of the fortieth and forty-first counts, besides imprisonment under the fortieth and forty-first counts, making the total of fines \$1,850. In view of the facts in this particular case shown in the evidence, and especially that this indictment of this defendant was obtained soon after the anti-saloon law went into force in that territory, and that there is no direct proof that defendant sold intoxicating liquor to any residents of said anti-saloon territory or to any persons except the two detectives, we conclude that the fines are unnecessarily severe for the accomplishment of the purposes of the law. Unless defendant is a wealthy man they bankrupt him and drive him out of a business which he conducts at that place, and which, except in this one particular, is entirely legitimate. It has been a serious question with us how we can afford relief in

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this respect. We conclude to modify each one of these fines by reducing the fine under each count excepting the fortieth and forty-first to \$37.50, and the fines under the fortieth and forty-first to \$50 each, which will make the total fines \$925. As so modified the judgment will be affirmed.

Judgment modified and affirmed.

The People of the State of Illinois, Defendant in Error, v. Thomas H. McCann, Plaintiff in Error.

Gen. No. 6,333. (Not to be reported in full.)

Error to the County Court of Lake county; the Hon. PERRY L. PERSONS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed February 10, 1917. Rehearing denied April 12, 1917.

Statement of the Case.

Prosecution by the People of the State of Illinois, plaintiff, against Thomas H. McCann, defendant, for violation of the act relating to anti-saloon territory. From a judgment for conviction under three counts, including the nuisance count, defendant brings error.

P. L. JORGENSEN, for plaintiff in error.

RALPH J. DADY and E. M. RUNYARD, for defendant in error; W. F. WEISS, of counsel.

MR. JUSTICE DIBELL delivered the opinion of the court.

The People v. McGuire, 205 Ill. App. 105.

Abstract of the Decision.

INTOXICATING LIQUORS, § 147*—*when evidence sufficient to sustain conviction.* The evidence held to sustain a conviction under the anti-saloon law for selling cider and buck, proved to be intoxicating.

The People of the State of Illinois, Defendant in Error, v. Mike McGuire, Plaintiff in Error.

Gen. No. 6,334. (Not to be reported in full.)

Error to the County Court of Lake county; the Hon. PERRY L. PERSONS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed February 10, 1917. Rehearing denied April 12, 1917.

Statement of the Case.

Prosecution by the People of the State of Illinois, plaintiff, against Mike McGuire, defendant, for violation of the act relating to anti-saloon territory. From a judgment for conviction under four counts, including a nuisance count, defendant brings error.

P. L. JORGENSEN, for plaintiff in error.

RALPH J. DADY and E. M. RUNYARD, for defendant in error; W. F. WEISS, of counsel.

MR. JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

INTOXICATING LIQUORS, § 147*—*when evidence sufficient to sustain conviction.* Evidence held to sustain a conviction under the anti-saloon law for selling buck, alco and cider, proved to be a malt liquor or intoxicating.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Cessar, 205 Ill. App. 106.

The People of the State of Illinois, Defendant in Error, v. George Cessar, Plaintiff in Error.

Gen. No. 6,335. (Not to be reported in full.)

Error to the County Court of Lake county; the Hon. PERRY L. PERSONS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed February 10, 1917. Rehearing denied April 12, 1917.

Statement of the Case.

Prosecution by the People of the State of Illinois, plaintiff, against George Cessar, defendant, for violation of the anti-saloon territory law. From a judgment for conviction under thirteen counts, including the nuisance count, defendant brings error.

P. L. JORGENSEN, for plaintiff in error.

RALPH J. DADY and E. M. RUNYARD, for defendant in error; W. F. WEISS, of counsel.

MR. JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. INTOXICATING LIQUORS, § 147*—*when evidence sufficient to sustain conviction.* Evidence held sufficient to sustain a conviction under the anti-saloon law for selling cider, proved to be intoxicating.

2. INTOXICATING LIQUORS, § 147*—*when evidence sufficient to sustain conviction under nuisance count.* Proof justifying conviction under the anti-saloon law for selling intoxicating liquors, held to authorize conviction also under a nuisance count under the law.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People of the State of Illinois, Defendant in Error, v. Joe Polansek, Plaintiff in Error.

Gen. No. 6,336. (Not to be reported in full.)

Error to the County Court of Lake county; the Hon. PERRY L. PRANSKY, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed February 10, 1917. Rehearing denied April 12, 1917.

Statement of the Case.

Prosecution by the People of the State of Illinois, plaintiff, against Joe Polansek, defendant, for violation of the act relating to anti-saloon territory. From a judgment for conviction under fifteen counts, including a nuisance count, defendant brings error.

P. L. JOERGENSEN, for plaintiff in error.

RALPH J. DADY and E. M. RUNYARD, for defendant in error; W. F. WEISS, of counsel.

MR. JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. INTOXICATING LIQUORS, § 147*—*when evidence insufficient to sustain conviction for selling cider.* Evidence held not to sustain conviction under the anti-saloon law for selling cider, under the evidence of defendant, and the man from whom he bought the cider shortly before the sale shown as the basis for conviction, that it was sweet cider and not hard cider or fermented liquor.

2. INTOXICATING LIQUORS, § 147*—*when evidence sufficient to sustain conviction.* Evidence held sufficient to sustain conviction under the anti-saloon law for selling malt liquor.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Fessenden v. Travelers Ins. Co., 205 Ill. App. 108.

Katherine L. Fessenden, Appellee, v. Travelers Insurance Company, Appellant.

Gen. No. 6,344. (Not to be reported in full.)

Appeal from the City Court of Aurora; the Hon. EDWARD M. MANGAN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed February 10, 1917. Rehearing denied April 19, 1917.

Statement of the Case.

Action on a policy of accident insurance on the life of C. N. Fessenden by the beneficiary, Katherine L. Fessenden, plaintiff, against the Travelers Insurance Company, defendant. From a judgment for plaintiff for \$7,500, defendant appeals.

FRANK M. COX and R. J. FELLINGHAM, for appellant;
RAYMOND & NEWHALL, of counsel.

J. A. CONNELL and ALSCHULER, PUTNAM & JAMES,
for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 667*—*when evidence sufficient to sustain verdict for plaintiff in action on accident policy.* In an action upon an accident insurance policy to recover for the death of the insured, a man sixty-eight years of age, and in good health, where plaintiff claimed that death was caused by slipping and falling upon an icy sidewalk and striking the back and head, and the defense was that death was caused through the stopping of the heart due to a diseased condition, and the coroner's jury found that the deceased came to his death as the result of a diseased condition, evidence held sufficient to sustain a verdict for plaintiff.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ferry v. City of Waukegan, 205 Ill. App. 109.

2. INSURANCE, § 667*—*what is effect of witnesses not testifying positively as to cause of death.* In an action upon an accident insurance policy to recover for the death of the insured, where the defendant claimed that there was a fatal defect in plaintiff's proofs because no physician testified positively that the fall in question caused the insured's death, *held* that such contention excluded the inferences which the jury might reasonably draw from the proof of what did occur.

3. TRIAL, § 78*—*when evidence competent in rebuttal.* In an action upon an accident insurance policy to recover for the death of the insured, where the defendant objected to the introduction by plaintiff, after the defense had put in its proof, of the testimony of the witnesses who held one of the post-mortems, *held* that such evidence was competent in rebuttal.

4. TRIAL, § 78*—*what is competent rebuttal evidence.* Where, in an action upon an accident insurance policy to recover for the death of the insured, the defendant's witnesses had testified that hardening of the arteries of an old person was a disease, *held* that testimony for plaintiff that such hardening was an ordinary incident of old age and was not considered a disease, was competent in rebuttal.

5. INSTRUCTIONS, § 151*—*when refusal proper.* Where the material portions of refused instructions are contained in given instructions, such refusal is not error.

Grace L. Ferry, Administratrix, Appellee, v. City of Waukegan, Appellant.

Gen. No. 6,400.

1. TRIAL, § 195*—*when instruction to find for defendant is properly refused.* An instruction to find for the defendant must be refused where there is evidence fairly tending to make a case for the plaintiff, even if the evidence is such that, if a verdict was returned for the plaintiff, the court would feel bound to grant a new trial.

2. APPEAL AND ERROR, § 1735*—*when former decision not controlling on second appeal.* Where a former judgment in a personal

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ferry v. City of Waukegan, 205 Ill. App. 109.

injury case was reversed on the ground that there was evidence fairly tending to make a case for the plaintiff and that the court was not warranted in directing a verdict for the defendant, and, on appeal from a judgment in favor of plaintiff in the second trial, it was claimed that such former decision was decisive, *held* that such former decision did not determine that a weighing of the evidence on a motion for a new trial or on an appeal would support the verdict, and that therefore the merits must be considered on the second appeal.

3. MUNICIPAL CORPORATIONS, § 1098*—*when evidence sufficient to sustain finding that automobile ran over material in street.* In an action against a city for death caused by plaintiff's intestate being thrown from an automobile which struck something while running along a street in the nighttime, where the plaintiff claimed that the automobile struck a pile of building material contained in the street, and the defendant claimed that the driver ran against the curb and thereby produced the accident, and did not run over the pile of material, evidence *held* sufficient to sustain the finding that the automobile ran over the material.

4. MUNICIPAL CORPORATIONS, § 1098*—*what constitutes prima facie case of negligence due to allowing building material on street.* In an action against a city for death caused by plaintiff's intestate being thrown from an automobile which in the nighttime struck against a pile of building material in a street, where it appeared that the material had been in the street for an unreasonable length of time, and that a considerable time before the accident in question the city was notified that it was dangerous to have the pile there at night without danger signals on it, and that the proper officers had promised to have that attended to, but nothing was done, *held* that the jury could reasonably find that it was negligence for the city to have the material in the street at the time of the accident, and that plaintiff had therefore made a prima facie case.

5. APPEAL AND ERROR, § 1265*—*when presumed that jury found against defendant as to contributory negligence of occupant of automobile.* In an action against a city for death caused by plaintiff's intestate being thrown from an automobile in which he was being driven, upon its striking a pile of material in a street, where the accident occurred about half an hour after sundown, and the lamps on the automobile were not lighted, and the defendant claimed that the failure to light up was in violation of section 4 of the Motor Vehicle Act of 1911 (J. & A. ¶ 10004), requiring motor vehicles to carry lamps from sunset to one hour before sunrise, and that such negligence of the driver was also attributable to the deceased, who was aware that the lights were not lit, *held* that it was not clear

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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from the evidence that the failure to have lights on the automobile contributed to the accident, and as the instructions were not in the abstract and no complaint was made concerning them, it must be presumed that proper instructions were given concerning the contributory negligence of the deceased, and that the jury determined that fact against the defendant.

6. MUNICIPAL CORPORATIONS, § 1098*—*when evidence in action against city sufficient to sustain finding for plaintiff as to speed of automobile.* In an action against a city for death caused by an automobile in which deceased was riding striking a pile of material in a street, where the evidence was conflicting as to whether the speed of the automobile exceeded the limit of fifteen miles per hour as fixed by section 10 of the Motor Vehicle Act (J. & A. ¶ 10010), and it appeared that the blood upon the pavement furthest from the material was seventy-five to eighty-two feet therefrom, and it was claimed that this required the jury to find that the speed greatly exceeded fifteen miles per hour, but there was the positive evidence of several witnesses that the speed was less than fifteen miles per hour, evidence held sufficient to sustain a finding for plaintiff as to the speed of the automobile.

7. NEGLIGENCE, § 112*—*when negligence of driver of vehicle not bar to recovery by passenger.* Negligence of the driver of a vehicle does not usually bar recovery against a third person by a passenger who has no control over the driver.

Appeal from the Circuit Court of Lake county; the Hon. CLAUDE C. EDWARDS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed February 10, 1917. Rehearing denied April 12, 1917.

ARTHUR BULKLEY, for appellant.

COOKE, POPE & POPE and ALEX BEAUBIEN, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

On December 9, 1912, Edward L. Ferry was killed in an automobile accident on a street in Waukegan. He left next of kin, and the administratrix of his estate brought this suit to recover damages for their

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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loss. On the trial defendant had a judgment, which we reversed in 196 Ill. App. 81. Upon another trial plaintiff had a verdict and a judgment for \$3,000, from which defendant appeals. It is not claimed that the court erred in any rulings on the evidence. The instructions are not set out in the abstract. The only grounds on which a new trial was sought were that the verdict was not supported by the law or the evidence.

Appellee contends that our former decision is decisive of the case now presented. At the former trial the verdict was based upon an instruction directing the jury to find the defendant not guilty. Our former decision was that there was evidence fairly tending to make a case for the plaintiff and that in such case the court was not warranted in directing a verdict for the defendant. Such an instruction under such circumstances must be refused, even if the evidence is such that, if a verdict was returned for the plaintiff, the court would feel bound to grant a new trial. *Libby, McNeill & Libby v. Cook*, 222 Ill. 206. Therefore our former decision did not determine that a weighing of the evidence on a motion for a new trial or on an appeal would support the verdict. Therefore the merits must here be considered.

James Ferry, a brother of deceased, owned the automobile and was running it. A Mr. Neal sat on the front seat with him. Henry Sine sat on the back seat with deceased. They had just started from Waukegan to return to their homes in Zion City. As they were going north in Sheridan Road, in a residence part of the city, they met a team hauling a hayrack and nearly in the center of the paved way. The driver turned to the east to pass around the wagon. There was a pile of building material, composed of cement; gravel and sand, in the street. The automobile struck something. It is the contention of appellee that it struck this pile

of material; that the automobile went over and beyond it some little distance and finally ran into a stepping block at the curb. The left front wheel of the automobile broke down. Deceased was flung into the street, was picked up unconscious and died that night. The pile in the street was a little ways west of the curb and was two or two and one-half feet high and probably four feet wide. The paved way was thirty-six feet wide. The evidence was that the top of the pile was knocked off and that there was a broad mark across at the top, such as would be made by an automobile wheel. Appellant showed that there were on the curb, beginning about seven feet south of the pile and extending north nearly to said stepping block, several fresh abrasions on the face of the curb, and it contended that the driver ran against the curb and thereby produced this accident, and did not run over the pile of material. This was a question of fact for the jury and we see no reason to disturb its conclusion that the automobile ran over the material.

It is not unlawful to permit building materials to be placed in a street preparatory to building on the adjacent land, if the street is not thereby improperly obstructed; but the materials must be removed within a reasonable time. *Tolman & Co. v. City of Chicago*, 240 Ill. 268. The evidence makes it probable that this material was placed on this street in July or August and makes it certain that it was there in September. The necessity for its presence on the street was over a long time before this accident. The city was notified long before this accident that this material ought to be removed, and its officers promised to attend to the matter, and they did remove a part of the material that had previously been there. About two weeks before this accident the city authorities cleaned up this street in that vicinity except that it left this pile. Quite a while before this accident the city was notified

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that it was dangerous to have that pile there at night without danger signals upon it, and the proper officers promised to have that attended to, but nothing was done. We are of opinion that the jury could reasonably find that it was negligence for the city to have that pile of material there at the time of the accident. Appellee therefore made a prima facie case.

Section 4 of the Motor Vehicle Act of 1911 (J. & A. ¶ 10004) requires motor vehicles to carry lighted lamps from sunset to one hour before sunrise. This accident occurred about thirty minutes after sundown, and the lamps on this automobile were not lighted. It is claimed that this was negligence that should bar a recovery. The negligence of a driver does not usually bar a recovery by a passenger who has no control over the driver. *Chicago & A. R. Co. v. Vipond*, 212 Ill. 199; *Nonn v. Chicago City Ry. Co.*, 232 Ill. 378; *Yeates v. Illinois Cent. R. Co.*, 241 Ill. 205; *Dudley v. Peoria Ry. Co.*, 153 Ill. App. 619. But appellant contends that to permit this automobile to proceed with a light in violation of law is also the negligence of the passenger who is injured, under *Flynn v. Chicago City Ry. Co.*, 250 Ill. 460. About a mile before the place of the accident was reached, Sine, sitting on the back seat with deceased, asked James Ferry, the driver, if his lights were lit, and the driver replied that he would light them when he reached the end of the street lights. It was not yet dark and the street lights were on. Deceased was in a conversation with Sine about a proposal concerning a business trip to the west to be made by the two together. At most, it was a question of fact for the jury whether deceased should have insisted on leaving the car unless its lamps were immediately lighted. It is not clear from the evidence that the failure to have lights on the automobile contributed to the accident. The automobile was proceeding in the same line of travel as that on which the hay-

rack was coming. When the driver nearly reached the hayrack he turned suddenly to the east to go around it and then was first confronted with this pile of material. It is not clear that he would have seen the material any sooner if his lights had been on. As the instructions are not in the abstract and no complaint is made concerning them, we must assume that proper instructions concerning the contributory negligence of deceased were given, and that the jury determined that question of fact against appellant. Section 10 of said Motor Vehicle Act (J. & A. ¶ 10010) restricts the speed of automobiles in the residence portions of an incorporated city to fifteen miles per hour. The proof for appellee was to the effect that this automobile was running within that limit. The proof introduced by appellant tended to show that the speed greatly exceeded the prescribed limit. The blood upon the pavement farthest from the pile of material proved to be from seventy-five to eighty-two feet therefrom, and it is insisted that this required the jury to find that the speed greatly exceeded fifteen miles per hour. There is force in this argument, but it assumes that the body of deceased left the automobile at the pile of material. The automobile was in fact in motion while the body of deceased was leaving the car, and it may be that the left front wheel did not entirely collapse, and deceased did not actually leave the car, until the automobile struck the stepping block. This also leaves out of consideration the angle at which the car may have approached the material and what the driver may have done with the wheel after the automobile struck the material; and the driver was rendered unconscious and was unable to tell what did take place. We do not feel warranted in disturbing the conclusion of the jury, supported as it is by the positive evidence of several witnesses that the speed was less than fifteen miles per hour. We therefore think it unneces-

Smith v. Smith et al., 205 Ill. App. 116.

sary to determine whether the deceased, engaged in a business conversation with the man by his side on the back seat, was bound at his peril to take notice of the speed of the vehicle and to require it to be reduced or to leave the car.

We find no reversible error in the record and the judgment is therefore affirmed.

Affirmed.

John M. Smith et al., Plaintiffs in Error, v. George W. Smith and Robert W. Rank, Administrator, Defendants in Error.

Gen. No. 6,234. (Not to be reported in full.)

Error to the Circuit Court of Rock Island county; the Hon. WILLIAM T. CHURCH, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed April 19, 1917.

Statement of the Case.

Bill in equity by John M. Smith, Nellie M. Clow, Nellie Anderson, Arthur E. Johnson and Anne E. Smith, as heirs of John P. Smith, deceased, complainants, against George W. Smith, sole beneficiary, and Robert W. Rank, administrator with the will annexed of John P. Smith, defendants, to set aside the will of said deceased. From a decree dismissing the bill for want of equity, complainants bring error.

WILLIAM McENIRY and FLOYD E. THOMPSON, for plaintiffs in error.

J. T. & S. R. KENWORTHY, for defendants in error.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. *WILLS, § 20*—what are not insane delusions.* In proceedings to set aside a will where it was claimed that the unsoundness of mind of the testator was manifested by his search for gold or coal on his farm, and that his belief that gold could be found in paying quantities was a delusion resulting from an unsound state of mind, and it appeared that the notions which the testator had concerning the probability of finding gold or coal were not purely imaginative but had some basis in fact, *held* that such ideas of the testator were conclusions and not delusions.

2. *WILLS, § 20*—what constitutes a delusion.* In proceedings to set aside a will where it was claimed that the testator suffered from delusions resulting from an unsound mind, *held* that a delusion is not a deduction from facts, but something purely imaginative, a figment of the brain.

3. *WILLS, § 20*—what are not delusions.* Where the notions of a testator charged with suffering from delusions resulting from an unsound state of mind are based upon some sort of evidence, however insufficient, such notions are deemed conclusions and not delusions.

4. *WILLS, § 20*—when existence of insane delusions not shown.* An insane delusion is not established when the court is able to understand how a person situated as the testator was might have believed all that the evidence shows that he did believe, and still have been in full possession of his senses.

5. *WILLS, § 20*—what does not constitute a delusion invalidating will.* Where a testator has actual grounds for suspicion of the existence of something in which he believes, though in fact not well founded and disbelieved by others, a misapprehension of the fact is not a matter of delusion which will invalidate his will.

6. *WILLS, § 30*—who has burden of proof as to sanity of testator.* In the contest of a will upon the question of testamentary capacity, the burden of proving the sanity of the testator is in the first instance on the proponents, but after a prima facie case has been made out by the testimony of the subscribing witnesses, the legal presumption is in favor of sanity, and the burden of the whole case rests upon the contestants.

7. *WILLS, § 19*—when senile dementia does not constitute mental incapacity to make will.* While senile dementia is a weakening con-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Barney, 205 Ill. App. 118.

dition of the mind resulting from old age and bringing about a diminution of the mental faculties, it does not necessarily result in mental incapacity to make a will.

8. WILLS, § 19^a—*when evidence insufficient to show mental incapacity to make will.* In a will contest where expert witnesses testified that the testator had *senile dementia* on a certain date and that he was so afflicted four months previous, when the will was made, but did not testify that such *senile dementia* which the testator may have had during the month the will was made was of such a character as to affect his testamentary capacity, evidence held insufficient to show mental incapacity to make a will.

The People of the State of Illinois, Defendant in Error, -v. Frank Barney, Plaintiff in Error.

Gen. No. 6,323. (Not to be reported in full.)

Error to the County Court of Boone county; the Hon. WILLIAM C. DE WOLF, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded. Opinion filed April 19, 1917.

Statement of the Case.

Prosecution by the People of the State of Illinois, plaintiff, against Frank Barney, defendant, for illegally selling intoxicating liquor in anti-saloon territory. From a judgment sentencing defendant to pay a fine of one hundred dollars and for confinement in the county jail for eighty days and ordering the place in which the liquor was sold to be abated as a nuisance, defendant brings error.

WILLIAM L. PIERCE, for plaintiff in error.

PATRICK H. O'DONNELL,³ for defendant in error.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

^aSee Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Pedroni v. Illinois Third Vein Coal Co., 205 Ill. App. 119.

Abstract of the Decision.

1. **INTOXICATING LIQUORS, § 151***—*when evidence insufficient to sustain conviction for illegally selling intoxicating liquor in anti-saloon territory.* In a prosecution for illegally selling intoxicating liquor in anti-saloon territory and maintaining a nuisance, where a conviction was had upon two of eleven counts, and it appeared that of the four witnesses upon whose testimony the People relied for a conviction one did not sufficiently connect the plaintiff with the sale testified to, another was impeached and the remaining two must have been mistaken in their testimony, *held* that the verdict was not based upon sufficiently reliable evidence to sustain a conviction in a criminal case.

2. **CRIMINAL LAW, § 207***—*when abridgment of right of cross-examination prejudicial error.* It is prejudicial error to unduly abridge the right of cross-examination to which a defendant in a criminal case is entitled.

Joseph Pedroni, Appellee, v. Illinois Third Vein Coal Company, Appellant.

Gen. No. 6,337. (Not to be reported in full.)

Appeal from the Circuit Court of Bureau county; the Hon. JON A. DAVIS, Judge, presiding. Heard in this court at the October term, 1916. *Affirmed.* Opinion filed April 19, 1917.

Statement of the Case.

Action by Joseph Pedroni, plaintiff, against the Illinois Third Vein Coal Company, defendant, to recover damages for personal injuries sustained while in defendant's employ as a coal miner. From a judgment for plaintiff for five hundred dollars, defendant appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Pedroni v. Illinois Third Vein Coal Co., 205 Ill. App. 119.

MCDougall, Chapman & Bayne, for appellant; Martin & Sherlock, of counsel.

J. L. Murphy, for appellee.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. STATUTES, § 196*—*how construed*. Statutes are to be construed with reference to the purposes for which they are enacted.

2. MINES AND MINERALS—*when mine operator liable for injury caused by falling of top of cage*. In an action against a mine operator for personal injuries sustained by a miner while he was on a cage used in a coal mine for hoisting the miners, where it appeared that there was an opening in the top of the cage, that the door to cover this opening was standing upon its hinges, that the plaintiff, while hurriedly getting into the cage and reaching up for a handhold to steady himself, grasped the edge of this open place, and that as he did so the said door fell and crushed his fingers, and plaintiff contended that the keeping of the door open was in violation of that portion of the statute requiring such cages to be furnished with a sheet metal covering, *held* that the language of the statute did not indicate that its sole purpose was to protect miners who rode in cages from falling objects, and that it was, in effect, violated because at the time of the injury the cage was not in the condition in which the statute contemplated it should be, by reason of the failure to cover up the opening in the top of the cage.

3. APPEAL AND ERROR, § 1540*—*when instructions not limiting negligence to that charged in declaration not reversibly erroneous*. Where, in an action to recover for injuries sustained by a miner while in a cage in a coal mine, certain instructions given for the plaintiff were subject to the criticism that they permitted the jury to find for the plaintiff if the injury was caused by negligence in failing to provide a safe cage for plaintiff to ride in, without limiting such negligence to that charged in the declaration, *held* that as there was no evidence of negligence other than that charged, the instructions could not have harmed the defendant and the error was not sufficient to reverse.

4. MINES AND MINERALS—*what is purpose of statute requiring metal covers on cages*. In an action by a miner for injuries sus-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tained in a coal mine through the falling of a door, standing upright on top of the cage in which the plaintiff was riding, falling on his hands while he had hold of the edge of an opening on the top of the cage, where the plaintiff claimed that such opening constituted a violation of that part of the Mines and Mining Act requiring cages used in the shafts for hoisting and lowering workmen into the coal mine to be furnished with a sheet metal cover, and the defendant claimed that the only purpose of the statute was to protect persons in the cage from falling objects, *held* that the protection of persons against falling objects was the test of the adequacy of the covering rather than its sole purpose, and that the obvious meaning of the statute was, not only that such cages should be equipped with metal covers, but also that they should be in use as such when the cages were operated for hoisting miners.

5. INSTRUCTIONS, § 137*—*when properly refused*. Instructions stating that the jury must make their finding under their oaths concerning a certain feature of a case are properly refused.

6. MINES AND MINERALS, § 186*—*when instruction in action by miner for injuries from falling of top of cage is erroneous*. In an action for injuries sustained by a miner in a coal mine, where violation of a statute was involved and the plaintiff also charged common-law negligence, and defendant claimed that the only purpose of the said statute was to protect persons who were in a cage from falling objects, and that plaintiff was not entitled to recover because he was not injured by a falling object, *held* that an instruction practically directing a verdict for the defendant in case they found that the injury was not caused by a falling object was properly refused, as it limited the right of recovery to injuries resulting from a violation of the statute, and ignored the plaintiff's right to recover if there was sufficient evidence under the counts charging common-law negligence.

7. INSTRUCTIONS, § 137*—*when properly refused*. An instruction leaving the jury to determine whether under the evidence there was a violation of a statute as a matter of law is properly refused.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same, topic and section number.

Whelan v. Massachusetts Bonding & Ins. Co., 205 Ill. App. 122.

Rev. Father J. Whelan, Appellee, v. Massachusetts Bonding & Insurance Company (Impleaded with William Underwood), Appellant.

Gen. No. 6,338.

1. INDEMNITY, § 23*—*when declaration in action on building contractor's bond is not demurrable for failure to allege payment of money.* In an action on an indemnifying bond insuring the performance of a building contract, where the declaration alleged as breaches the failure of the contractor to pay for materials which he was bound to furnish for the erection of the buildings resulting in the filing of mechanics' liens, and subsequent further breaches were assigned, and it was alleged that since the commencement of the suit a decree in favor of the parties having mechanics' liens had been entered, and a demurrer to the declaration on the ground that no payment of money was alleged, and that therefore no breach of the bond was shown, was overruled, and the defendant elected to abide by the demurrer and default was entered but no damages were assessed under the original declaration, *held* that the allegations of the declaration were sufficient to cover at least nominal damages, and that the plaintiff had the right to sue for a recovery of such damages when no substantial damages had yet accrued, and that under the Practice Act, sec. 35 (J. & A. ¶ 8572), the plaintiff had the right to recover nominal damages under the declaration, if the averment came within the indemnity clause of the bond, and afterwards, if he suffered substantial damages, could assign additional breaches of the bond to recover such additional damages, and that therefore the original declaration was not demurrable.

2. INDEMNITY, § 23*—*when declaration in action on bond sufficiently alleges delivery to defendant of written statement showing default of contractor.* Where, in an action on an indemnifying bond, the defendant claimed that the declaration was demurrable on the ground that there was no proper allegation of the delivery to the defendant of a written statement of the facts showing the default of the contractor, within ten days of obtaining knowledge of the default, *held* that the allegation, although general in its terms, was not demurrable.

3. PLEADING, § 53*—*when declaration is sufficient as against general demurrer.* An allegation in a declaration alleging performance

*See Illinois Notes Digest, Vols. XI to XV. and Cumulative Quarterly, same topic and section number.

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of precedent conditions in general terms is sufficient, at least as against a general demurrer.

4. INDEMNITY, § 23*—*when declaration in action on bond not demurrable on ground that action is prematurely brought.* In an action on an indemnifying bond where it appeared that certain notices were required to be sent as a condition precedent to the commencement of an action, and where a demurrer was filed on the ground that the action was prematurely brought, *held* that a demurrer would not lie on the ground stated, as it did not affirmatively appear on the face of the declaration that the action was prematurely brought.

5. INDEMNITY, § 13*—*when notice of default waived.* The denial by an insurance company of all liability under an indemnifying bond waives the necessity of proof of any notice of default which may be required by the bond as a condition precedent to the maintenance of an action thereon.

6. INDEMNITY, § 23*—*when declaration in action on bond to insure performance of building contract shows interest of plaintiff in premises.* Where, in an action on an indemnifying bond to insure the carrying out by the contractor of a church and parsonage building contract, it was claimed that no damage could result to the plaintiff, who was the pastor, on the ground that the premises were owned by a bishop of the church, *held* that while the declaration contained allegations that the legal title was vested in the bishop, it also contained averments that the premises were the property of the plaintiff, and the inference properly to be drawn under the demurrer was that the title held by such bishop was held by him in trust, and that the equitable ownership was in the plaintiff.

7. PLEADING, § 215*—*what is effect of demurrer.* A demurrer does not go to the question of damages.

8. INDEMNITY, § 5*—*who may indemnify himself by contract against damage by loss of property.* The holder of any interest in property may legally indemnify himself by contract against damage he may suffer by its loss, and it is not necessary that he should hold the legal title.

9. PLEADING, § 200*—*what is effect of demurrer.* A demurrer admits the averments in a declaration that the premises in question were the property of the plaintiff.

10. INDEMNITY—*when surety on building construction bond precluded from raising objection that declaration does not show ownership of premises in plaintiff.* In an action against a surety company on a bond indemnifying plaintiff against loss under a building contract where, on demurrer, the defendant claimed that the declaration

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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did not show ownership by the plaintiff of the property in question, *held* that the defendant was not in position to avoid the obligation by denying ownership in plaintiff, it having contracted with him for indemnity and received valuable consideration therefor on the basis of his ownership, and in legal effect had obligated itself to pay indemnity on that basis.

11. INDEMNITY, § 23*—*when special pleas to declaration in action on building construction bond are insufficient.* In an action against a surety company on a bond indemnifying plaintiff against loss under a building contract, where the defendant in special pleas alleged that the plaintiff had no right to recover because the damages alleged did not accrue within the required period after the completion of the building, *held* that such pleas were demurrable, as such allegations were mere conclusions and no facts were alleged upon which an issue could have been tried.

12. INDEMNITY, § 24*—*when presumed that time limitation in bond for recovery of damages is waived.* Where, in an action against a surety company on a bond indemnifying against loss under a building contract, it appeared that the bond provided that no recovery should be had for damages accruing after the lapse of a certain specified period, but it also provided that the plaintiff should preserve and exercise all rights provided for his protection by the lien laws, and plaintiff, before suing on the bond, had contested the question of mechanics' liens, and as such defense could not have been made within the time fixed by the bond, *held* that the defendant was legally presumed to have waived the limitation, and it therefore became inoperative.

13. INDEMNITY, § 23*—*when plea in action on building construction indemnity bond is demurrable as raising question of law.* Where, in an action on an indemnifying bond, a plea was filed raising the question as to whether the limitation fixed in the bond relative to the accruing of damages was not waived or rendered inoperative, *held* that the question was one of law and could not be raised by plea, and that the demurrer to the plea was properly sustained.

14. INDEMNITY, § 23*—*what defense should be specially pleaded to original declaration in action on building construction indemnity bond.* Where, in an action on an indemnifying bond insuring the performance of a building contract, a default was entered under the original declaration, and additional breaches were assigned after the filing of the original declaration, and defendant claimed that the jury should have been instructed to find for the defendant on the ground that the plaintiff failed to perform and comply with

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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a condition requiring plaintiff to exercise and preserve all right provided for his protection by the laws relating to liens, in that he failed to require the contractor to give a verified statement in writing of the names of parties furnishing materials, etc., *held* that if the defendant was entitled to defend upon the ground stated, it was necessary that such defense should have been pleaded specially, and that it should have been pleaded to the original declaration, and as the question of plaintiff's liability had been adjudicated by the judgment on the declaration originally filed, the defendant could not reopen the question of liability in the matter of damages resulting from the alleged additional breaches, and could not reopen the question of its legal liability on the bond, in the motion to direct a verdict.

Appeal from the Circuit Court of De Kalb county; the Hon. CLINTON F. LEWIN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 19, 1917.

MOSES, ROSENTHAL & KENNEDY, for appellant; WALTER BACHRACH, of counsel.

CLIFFE & CLIFFE and PEFFERS & WING, for appellee.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

The appellee, Rev. John H. Whelan, a Catholic priest in charge of a church and parsonage as pastor at Maple Park, entered into a contract with one William Underwood of Waverly, Iowa, on the 14th of August, 1913, for the purpose of erecting a church building and parsonage, and under the terms of the contract Underwood, the contractor, was to furnish the work and materials necessary to build the church and parsonage, according to the plans and specifications which had been prepared, and to complete the same on or before January 1, 1914, and he was to be paid therefor the sum of \$22,880. To secure the faithful performance of this building contract, the contractor, as principal, and the appellant as surety, executed to Father Whelan a bond in the penal sum of \$11,440, which bond was to indemnify Father Whelan

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against any loss or damage which might result to him from a failure on the part of the contractor to carry out on his part the terms of the building contract.

The church and parsonage were built by the contractor and completed within the time required by the contract, but it was found that the contractor had failed to pay for the materials which he had purchased for the buildings, and which had been used in constructing and completing them. The parties who had sold and delivered the materials for the church and parsonage filed claims for liens under the Mechanics' Liens Act, and commenced suits to subject the premises upon which the church and parsonage had been built to mechanics' liens, which had accrued to them by virtue of the statute because of the failure of the contractor to pay. Thereupon Father Whelan brought suit on the indemnifying bond in question, in an action of debt, in the Circuit Court of DeKalb county, and this is an appeal from the judgment which was rendered in the suit in favor of the appellee and against the appellant for \$11,440 debt, and for damages to the amount of \$5,965.11.

The suit was brought on the 26th day of May, 1914, against the appellant and William Underwood, the contractor and principal on the indemnity bond, but the appellant was the only party defendant who was served with process, and the suit was afterward dismissed as to William Underwood. The declaration was filed on October 16, 1914, and sets out the articles of agreement entered into with the contractor and the indemnity bond executed by the appellant as surety for the contractor, and alleges, as breaches of the condition of the bond sued on, that the contractor had failed and refused to pay for the materials which, under the articles of agreement, he was bound to furnish and provide for the erection of the church and parsonage in question; that thereby a lien had accrued to

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the various parties who had furnished the materials not paid for by the contractor against the premises in question, and that some of the liens had already been filed against the premises. The appellant filed a general demurrer to the declaration, which was overruled by the court. The appellant elected to stand by its demurrer, and a default was entered against it for want of a plea, and judgment that the appellee recover the amount of his debt, and damages by him sustained by reason of the premises, but no assessment of damages was then made.

On April 27, 1916, the appellee made further assignments of breaches of the conditions of the bond, and it was then alleged that since the commencement of the suit certain mechanics' liens against the premises had been prosecuted, and that on the 25th day of March, 1916, the court had entered a decree ordering and adjudging that various parties had furnished materials to the contractor for the erection of the buildings in question, before and during the erection thereof, and before the completion thereof, for which the contractor had failed to pay, and that the various parties were entitled to mechanics' liens, and that the total amount of such liens was \$11,440.

To the additional assignments of breaches of the conditions of the bond, the appellant filed five pleas, the first plea being *non damnificatus*; the second plea averred that the additional assignments of breaches of the conditions of the bond were not true; the third plea averred that the alleged damages set forth in the additional assignments did not accrue to the appellee within six months next succeeding the date specified in the contract for the completion of the buildings; the fourth plea averred, in addition to the allegation that the damages did not accrue to the appellee within six months next succeeding January 1, 1914 (the date fixed in the contract for the completion of the build-

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ings), that the completion of the buildings was not prevented, delayed or hindered by any strike or other condition beyond the control of the contractor; and the fifth plea averred that the premises in question, which were subjected to the mechanics' liens, set out in the additional assignments of breaches, were not the property of the appellee, but were at all times the property of Peter J. Muldoon, Catholic Bishop of Rockford.

The appellee filed a general demurrer to the second, third, fourth and fifth pleas, which was sustained by the court. A replication was filed to the plea of *non damnificatus* and issue joined, and upon this issue the case was submitted to the jury. The jury found the issues for the appellee, and that the debt due to the appellee, was \$11,440, and assessed the appellee's damages at \$5,965.11.

At the close of the evidence in the case the appellant made a motion for a peremptory instruction to direct a verdict in favor of the defendant, which was refused. Various errors are assigned by the appellant on this appeal, namely, that the court erred in overruling appellant's demurrer to the declaration; that it erred in sustaining appellee's demurrer to appellant's third, fourth and fifth pleas filed to the additional assignments of breaches of the bond; and that the court erred in denying appellant's motion for a peremptory instruction at the close of the evidence; also, that the court erred in denying appellant's motion to set aside the assessment of damages made by the jury and for a new trial, and in arrest of judgment.

It is contended by appellant that the demurrer to the declaration should have been sustained because the bond sued on is one of indemnity against loss and damage sustained by the appellee, and that the allegations in the declaration do not show a breach of the conditions of the bond, because the appellee, at the

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time of the filing of the declaration, had not been compelled to pay any money, and that no payment of money is alleged. It is true that the condition of the bond alleged to have been broken is one to indemnify the appellee against any loss or damage directly arising by reason of the failure of the contractor to faithfully perform his contract, and that there are no averments in the declaration of any payments of money in consequence of any failure on the part of the contractor; and it is true that under the averments of the declaration it does not appear that any substantial damages had been suffered by the appellee in consequence of the breach of the condition; but it also appears from the averments in the declaration that the premises in question were the property of the appellee; that the contractor failed to pay for the materials, which he was to provide, under his articles of agreement, and that by reason of such failure to pay, certain parties obtained liens, or had become entitled to liens, against his property; and these allegations were sufficient for the recovery of at least nominal damages. A demurrer does not go to the question of damages. (*Hill v. Carr*, 186 Ill. App. 515.) The appellee had the right to sue for recovery of nominal damages when no substantial damages had yet accrued. (*Radloff v. Haase*, 196 Ill. 365; *Dent v. Davison*, 52 Ill. 109.) And under the authority of *Leshner v. United States Fidelity & Guaranty Co.*, 144 Ill. App. 632, which was affirmed in 239 Ill. 502, appellee, by virtue of section 35 of our Practice Act (J. & A. ¶ 8572), could recover nominal damages under this declaration if the averment came within the indemnity clause of the bond, and afterwards, if he suffered substantial damages, could assign additional breaches of the bond to recover such additional damages.

We are therefore of the opinion that the declaration was not demurrable upon the ground urged.

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But appellant also insists that the declaration was demurrable because, under the terms of the bond sued on, appellee was required, as a condition precedent to his right to recover, to deliver to appellant a written statement of the particular facts showing a default of the contractor, and the date thereof, by registered mail, at its office at Boston, Massachusetts, not later than ten days after appellee, his representative, architect or engineer became aware of the contractor's default; that there is no proper allegation of the delivery of such statement; and that its omission renders the declaration fatally defective. The declaration, however, does aver that the appellee promptly, and within ten days after he, his representative, architect or engineer became aware thereof, notified the appellant by registered mail at its office at Boston, Massachusetts, in writing, of each and all the defaults of the contractor; and that written statements of the particular facts showing each of said defaults, and the dates thereof respectively, and of the neglect to pay either or any of the parties for the materials and supplies ordered and purchased by the contractor for the construction of the improvements mentioned in the contract, of which the appellant became aware as aforesaid, prior to June 8, 1914, and that the appellant accepted and acted upon such notices so given to it, and that by its letter of the date mentioned notified the appellee that there was no liability resting upon it, by reason of the bond in question, and that the appellant would not entertain any claim thereunder.

We are of the opinion that these allegations in the declaration, though general in their terms, are of sufficient definiteness to meet the requirements of the terms of the bond relative to notices of defaults by the contractor. And the allegations are to the effect that the appellant accepted and acted on said notices, and in and by its letter of June 8, 1914, notified appellee

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that it denied any liability whatever under the bond in question, and would not entertain any claim thereunder. A general statement in a declaration of the performance of precedent conditions is sufficient, at least as against a general demurrer. In the case of *Colonial Mut. Fire Ins. Co. v. Ellinger*, 112 Ill. App. 302, the rule and practice in this regard is referred to. The court says: "It will be seen from the statement of facts that appellee avers generally the performance of all the conditions precedent, and that the loss did not happen by reason of any of the conditions provided against in said policy. This is the usual and accepted form." To the same effect is *Aetna Ins. Co. v. Phelps*, 27 Ill. 71, and *Continental Life Ins. Co. v. Rogers*, 119 Ill. 486.

The averments in the declaration that notices were sent prior to June 8, 1914, which is alleged to be the date of appellant's letter denying liability, does not justify the inference, which appellant seeks to draw therefrom, that the sending of the notice was not prior to May 26, 1914, which was the date of the commencement of the suit. It is apparent, at any rate, that it does not affirmatively appear in the declaration that the notices required were all sent after the commencement of the suit. To make a declaration demurrable on the ground suggested it should show on its face that the condition precedent was not complied with (*American Exch. Nat. Bank of Chicago v. Seaverns*, 121 Ill. App. 480), and unless it appears affirmatively on that face of the declaration that the suit was prematurely brought, because of noncompliance with the prerequisite condition, the question of the premature bringing of the suit can be properly raised only by a plea in abatement. (*New Home Life Ass'n of Illinois v. Hagler*, 23 Ill. App. 457; *Upton v. Swedish American Hospital*, 157 Ill. App. 126.)

And it is well settled that the denial of all liability

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under the bond by appellant as alleged in the declaration waives the necessity of any proof of the notice of default required by the bond as a condition precedent. (*Lohr Bottling Co. v. Ferguson*, 223 Ill. 88; *Hansell-Elcock Co. v. Frankfort Marine Accident & Plate Glass Ins. Co.*, 177 Ill. App. 500; *American Home Circle v. Eggers*, 137 Ill. App. 595; *Phenix Ins. Co. v. Belt Ry. Co.*, 182 Ill. 33; *Aetna Ins. Co. v. Jacobson*, 105 Ill. App. 283; *Erie Fire Ins. Co. v. Hill*, 99 Ill. App. 178; *Northern Assur. Co. v. Chicago Mut. B. & L. Ass'n*, 98 Ill. App. 152; *American Cent. Ins. Co. v. J. B. Henniger & Co.*, 87 Ill. App. 440; *Williamsburg City Fire Ins. Co. v. Cary*, 83 Ill. 453.)

The appellant insists that the facts alleged in the declaration show that the property against which the claims for liens were filed, and which was involved by the mechanics' lien suits pending, was not the property of the appellee, but of Peter J. Muldoon, Catholic Bishop of Rockford, and that therefore it is evident that no loss or damage could result to appellee by the subjecting of property, which was not his own, to the alleged liens. It may be said concerning this contention that the declaration avers that the premises in question against which the liens involved were filed and prosecuted is the property of the appellee. While it also contains averments which show that the legal title was vested in Peter J. Muldoon, as Catholic Bishop of Rockford, there is no inconsistency in these averments. The inference properly to be drawn from the averments is that the title which is vested in Peter J. Muldoon, as Catholic Bishop of Rockford, is held by him in trust, and that the equitable ownership, or right to enjoy the same, is presumable in the appellee.

The right to use and enjoy the premises for life, or for a term of years, would be a sufficient property right to constitute ownership for the purposes of this controversy. And in these rights of property and

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ownership, though limited in their character, appellee would have suffered a loss by the enforcement of the mechanics' lien claims. The holder of any interest in property may legally indemnify himself by contract against damages he may suffer by its loss, and it is not necessary that he should hold the legal title. *Home Ins. Co. of New York v. Mendenhall*, 164 Ill. 458. The demurrer admits the averment in the declaration that the premises in question were the property of appellee, and, as has been stated, this averment is not inconsistent with the averment of legal title in the Bishop of Rockford. Moreover, appellant was not in position to avoid its obligation by denying that appellee was the owner of the premises, it having contracted with him for indemnity and received a valuable consideration therefor, on the basis of his ownership, and in legal effect had obligated itself to pay indemnity on that basis.

None of the grounds upon which the appellant based its demurrer was tenable; and the court therefore properly overruled it; and the appellant having failed and refused to plead any matter of defense to the declaration, the judgment was rightfully rendered against it; and this judgment adjudicates the question of the appellant's liability to the appellee, and that the appellee was entitled under it to recover at least nominal damages.

The sustaining of the demurrer to appellant's third, fourth and fifth pleas to the additional assignments of the breaches of the indemnity conditions of the bond was also proper. The third and fourth pleas both allege that the appellee has no right to recover from the appellant, because the damages alleged in the additional assignments of breaches of the contract of the bond did not accrue within six months after the date of the completion of the buildings. This is a mere conclusion, and no facts are alleged in the plea upon which an issue could have been formed to try.

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It is an elementary rule of pleading that "every plea should be so pleaded as to be capable of trial, and must consist of matter of fact, the existence of which may be tried by a jury on an issue, or the sufficiency of which as a defense may be determined by the court upon demurrer, or matter of record which is triable by the record itself." (First Chitty's Pleadings, 7th Am. Ed. 573.) The averments constituting the assignment of additional breaches of the bond themselves show that the substantial damages accrued to appellee more than six months after the date fixed in the contract for the completion of the work; but other averments also show that the delay was caused because of the time necessarily required in the orderly course of the legal contest over the question of the right of the lienholders to an enforcement of their liens. The plea, therefore, alleges no new or different facts, but merely raised a question of law, namely, whether the limitation fixed in the bond relative to the accruing damages was not waived, or rendered inoperative because the litigation was required, under the terms of the bond to ascertain the amount and validity of the lien claims, and this question should therefore properly have been raised by demurrer. Inasmuch as the plea merely raised a question of law, and not of fact, it was demurrable. (*Clay Fire & Marine Ins. Co. v. Wusterhausen*, 75 Ill. 285.)

The fifth plea raised the question of property in appellee, and denied liability because the premises in question were not the property of appellee, but the property of the Catholic Bishop of Rockford. This question had already been adjudicated by the court in the case by overruling appellant's demurrer to the original declaration, and the rendition of the judgment on the declaration. The demurrer to this plea was therefore properly sustained.

The court did not err in denying appellant's motion

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for a peremptory instruction to direct a verdict for appellant, on the additional assignment of breaches of the conditions of the bond. In this motion appellant attempted to raise the same question which it had raised by its fourth and fifth pleas, namely, that the damages claimed by appellant did not accrue to him within six months after the date of the completion of the buildings. It is true that there is a clause in the bond which provides that no recovery shall be had for damages which accrue after the lapse of six months from the date specified in the contract for the completion of the work; but there is another clause in the bond which requires that the appellee should at all times preserve and exercise all rights provided for his protection by the laws relating to liens of the State wherein said contract was to be performed. One of the rights which appellee was bound, therefore, to enforce was the right to have the question judicially determined whether or not the parties claiming liens were entitled thereto. This is what the appellee did by contesting, in the regular legal form and manner, the enforcement of the liens claimed; and it is evident from the decree which adjudicated the rights of the lienholders, and the liability of the premises therefor, that the defense made by the appellee to the suits for the enforcement of the liens consumed the time which elapsed between the date of the filing of the lien suits (which was before the expiration of the date of completion) and the time of final adjudication of the liability, and the extent of the liability of the appellee, and the premises involved. Inasmuch as, by the terms of the bond, the appellant had bound the appellee to enforce his rights of defense to the claims made, and that such defense could not be made within the time fixed in the contract, the appellant is legally presumed to have waived the limitation, and the limitation therefore became inoperative. (*Stout v. City Fire Ins. Co.*

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of *New Haven*, 12 Iowa 371; *Longhurst v. Star Ins. Co.*, 19 Iowa 364; *Ausplund v. Aetna Indemnity Co.*, 47 Ore. 10, 81 Pac. 577.)

But appellant claims that the peremptory instruction should have been given because the evidence shows that appellee failed to perform and comply with the condition of the bond referred to requiring appellee to exercise and preserve at all times all rights provided for his protection by the laws of this State relating to liens, in that he failed to require the contractor, Underwood, under the provisions of the Mechanics' Liens Act to give him a statement in writing, verified by affidavit, of the names of all of the parties furnishing the materials and labor; and of the amounts due or to become due to each; whereby appellant could have avoided liability under the Mechanics' Liens Law. If appellant was entitled to defend against its liability upon the ground mentioned, it was necessary that such defense should have been pleaded specially; and, moreover, it should have been pleaded to the original declaration. The question of appellant's liability had already been adjudicated by the judgment on the declaration originally filed, and it could not reopen the question of liability in the matter of damages resulting from alleged additional breaches; and could not reopen the question of its legal liability on the bond in this motion to direct a verdict.

The record in the case does not disclose any error, and the judgment is affirmed.

Judgment affirmed.

William H. Selby et al., Appellants, v. Amanda Summers et al., Appellees.

Gen. No. 6,340.

1. WILLS, § 360*—*what estates created by*. On a bill for an accounting based upon the construction of the last will of a testator whereby the complainants claimed that the testator bequeathed a life estate in personal property to his widow, with remainder to his children, and where the widow had by her last will devised real estate purchased with the proceeds of a sale of such property to certain of her children to the exclusion of the complainants, and such provision in question was in two parts, the first devising a life interest in realty, and the second was as follows: "I also will and bequeathed unto her [the wife] all my household goods, personal property and money," *held* that the two clauses were distinct and separate and that one devised the realty with a life estate limitation, and the other bequeathed the personalty and money absolutely.

2. WILLS, § 364*—*when life estate not created in personalty*. A provision in a will as follows: "Second: I will and bequeath unto my wife, * * *, for and during her natural life, the northeast quarter of section three, in township nine north, range three east, in * * *. I also will and bequeath unto her all my household goods, personal property and money," construed in connection with a provision in another paragraph, that if, after the death of the widow, any of the personalty should remain not used or disposed of, it should go to the children of the testator, and *held* that the conjunctive word "also" did not connect the words of limitation—which definitely referred to the realty—with the separate and distinct bequest of the personalty, and that by the second clause of the second paragraph the testator bequeathed to his widow the absolute ownership of the personalty therein mentioned.

3. WILLS, § 247*—*when disposition of remainder in personalty is void*. Where, by the terms of one of the paragraphs of a will, personal property was bequeathed absolutely to the widow of the testator, and in a subsequent paragraph the testator directed that if, at the death of the widow, any of the personalty should remain unused or not disposed of, it should go to the children of the testator, *held* that the disposition of the remainder after the widow's death was void.

4. WILLS, § 327*—*when ownership of property disposed of by will is implied*. The right to dispose of property in a will without words of limitation legally implies ownership.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Selby v. Summers, 205 Ill. App. 137.

Appeal from the Circuit Court of Knox county; the Hon. GEORGE W. THOMPSON, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 19, 1917.

E. T. MORRISON, JOSEPH CROW, C. D. HENDRYX, CHARLES DICKERSON and GURLEY & FITCH, for appellants.

CHIPERFIELD & CHIPERFIELD and WILLIAMS, LAWRENCE, WELSH & GREEN, for appellees.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of Knox county, sustaining the demurrer to a bill brought by William H. Selby and others, appellants, against Amanda Summers and others, appellees, for an accounting, based upon the construction of the last will of Philoman B. Selby, deceased, by which it is claimed, that the deceased testator bequeathed to his widow, Elizabeth Selby, his household goods, personal property and money, for life, the remainder, after her death, to be equally divided among his children, or their descendants, share and share alike. The bill alleges that the widow, under the provisions of the will, received the personal estate of the testator, which amounted to about \$40,000; and that, by changing the character of the investments and reinvesting the estate, it grew to be of the value of about \$60,000 at the time of her death, which occurred on or about March 25, 1904; that a large part of the money which she received under the will she invested in real estate, the title to which she acquired in her own name; that the widow undertook to dispose of her personal property and the real estate purchased therewith, and the increments thereof, by her last will, to her daughters, Amanda Summers, Salina Clark and Ruth Bigelow, who are the appellees; that the appellants are not in-

formed as to how much of the personal estate or money was used for the purchase of real estate, but aver that some of the real estate acquired by her was partly purchased with the money and personal property of the estate of the deceased testator; and some was entirely purchased with such money and property; and claim an interest in said real estate to the extent that the personal estate of Philoman B. Selby was used and entered into the purchase price thereof, and ask for an accounting, both with reference to the personal property remaining at the time of the death of the widow, which it is alleged passed into the hands of the appellees; and also with reference to the interest claimed in the real estate, which was purchased, in whole or in part, by the personal estate of the deceased testator.

Appellants have no right to an accounting, if the widow, by virtue of the provisions of the will, became the absolute owner of the personal property. Appellants contend that a proper construction of the will requires that the second and the sixth paragraphs of the will to be considered together, to arrive at the intention of the testator; and that when considered together they show that the testator, by the second paragraph, intended to bequeath to his widow a life interest only in the personal property mentioned therein. The paragraphs are as follows:

“Second. I will and bequeath unto my wife, Elizabeth Selby, for and during her natural life, the northeast quarter of section three, in township nine north, range three east, in Knox County, Illinois. I also will and bequeath unto her all my household goods, personal property and money.”

“Sixth. After the decease of my wife, Elizabeth Selby, if any of the proceeds of my personal estate shall remain not used or disposed of by her, I will and direct that the same shall be equally divided between my children and their descendants, share and share

alike. If they are dead, the descendants to take a child's part."

The two clauses contained in the second paragraph are distinct and separate, and pertain to different subjects; the one devises the real estate, with the limitation embodied in the words "for and during her natural life"; and the other bequeaths the personal property and money, without any words of limitation whatever. It is claimed by appellants, that because the two clauses are connected by the conjunctive word "also" that this connects the bequest of the personal estate with the limitation "for and during her natural life," contained in the devise of real estate in the first clause. From a grammatical, as well as from a legal standpoint, it is apparent, however, that the only purpose of the conjunction is to connect the two clauses together as the provisions made by the testator for the widow; and not to connect the words of limitation (which definitely refer to the real estate) with the separate and distinct request of the personal property. It is evident, too, that the two clauses could be separated and placed apart in different parts of the will without changing or impairing the meaning or significance of either; and this of itself shows that, in meaning and effect, they are entirely independent of one another.

We are of opinion that by the second clause of the second paragraph the testator bequeathed to his widow the absolute ownership in the personal property mentioned therein. It is difficult to see how the testator could have used language to dispose of his personal property that would more clearly signify unconditional ownership.

If, however, the sixth paragraph is considered in connection with the second clause of the second paragraph, it becomes apparent at once that the testator had in mind that he had given his widow the right to dispose of the personal property as she might see fit.

This idea could only come from a contemplation of the terms of the second clause—there being no other words in the will from which the right to dispose of the property could be inferred; and the only right to dispose of the property which can be inferred from the second clause is such as would be incidental to ownership. Necessarily, therefore, he must have thought that by the terms of the second clause he had invested his widow with the ownership of the property bequeathed to her. The right to dispose of property in a will without words of limitation legally implies ownership. *Hamlin v. United States Exp. Co.*, 107 Ill. 443; *Wilson v. Turner*, 164 Ill. 398; *Burton v. Gagnon*, 180 Ill. 345. Nor is the force of the feature of the sixth paragraph above mentioned in any way diminished by the fact that in the same paragraph the testator directs a distribution of the personal property which might remain after the widow's death.

If the widow took the personal property under the provisions of the will, as absolute owner, then the disposition of the remainder after the widow's death, to the children or descendants, in the sixth paragraph of the will, was void, and did not change the character of the original bequest. It is said in 2d Jarman on Wills (5th Amer. Ed.), page 529, note 19: "In general, a gift over by remainder or otherwise, after an absolute legacy or devise in fee, of whatever may remain if the first legatee or devisee die without having disposed of it, is repugnant to the nature of the estate or interest first given, and void." And this doctrine has received sanction by our Supreme Court. (*Wilson v. Turner*, *supra*; *Griffiths v. Griffiths*, 198 Ill. 632; *Lambe v. Drayton*, 182 Ill. 110; *Jenne v. Jenne*, 271 Ill. 526.)

We conclude, therefore, that not only by the express terms of the will, but also by the manifest intention of the testator, as it appears from the language of the

Medearis v. Balenseifen, 205 Ill. App. 142.

sixth clause, Elizabeth Selby was the absolute owner of the personal property bequeathed to her; and that by her last will the property passed to Amanda Summers, Selina Clark and Ruth Bigelow, the appellees; and the appellants, under the averments of their bill, had no right to compel the appellees to account. The demurrer to the bill was properly sustained.

And in this view of the matter it becomes unnecessary to discuss other questions raised on this appeal. The decree dismissing the bill is affirmed.

Decree affirmed.

Lz Medearis, Appellant, v. Michael Balenseifen, Appellee.

Gen. No. 6,345. (Not to be reported in full.)

Appeal from the Circuit Court of Marshall county; the Hon. CLYDE E. STONE, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 19, 1917.

Statement of the Case.

Action by Lz Medearis, plaintiff, against Michael Balenseifen, defendant, to recover the sum of two hundred dollars which plaintiff claimed the defendant had agreed to pay him for rebuilding a dam on a part of the farm leased by plaintiff of defendant. From a judgment against plaintiff for costs, upon denial of a motion for new trial, plaintiff appeals.

FRED W. POTTER and BARNES, MAGOON & BLACK, for appellant.

HENRY E. JACOBS, CLARENCE W. HEYL and HARRY C. HEYL, for appellee.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. WITNESSES, § 253*—*when credibility of is for jury*. The weight of the evidence does not necessarily depend on the number of witnesses, but the matter of the credibility of the witnesses is also involved, and it is for the jury to determine which of the witnesses was more credible or more worthy of belief.

2. APPEAL AND ERROR, § 1411*—*when verdict of jury based on conflicting evidence not disturbed*. Where there is contrariety of evidence on both sides and the facts and circumstances by fair and reasonable intendment will warrant the inferences of the jury, a court of review will rarely, if ever, disturb a verdict, notwithstanding the fact that it may appear to be against the weight of the testimony so far as the number of witnesses is concerned.

3. APPEAL AND ERROR, § 450*—*when improper admission of evidence may not be complained of*. Error cannot be assigned on the ground of the admission of incompetent evidence where the complaining party failed to object to its admission.

4. APPEAL AND ERROR, § 1275*—*when presumed that conduct of counsel was not improper*. In the absence of anything in the record showing improper conduct of counsel, the court is bound to presume that such conduct was not improper and that, if it had been, a record would have been made of it.

5. NEW TRIAL, § 67*—*when not granted on ground of newly-discovered evidence*. A new trial will not be granted on the ground of newly-discovered evidence where the witness by whom such evidence is to be proven was present at the trial and testified on other matters, and no reason is apparent why the party could not by the exercise of proper diligence have ascertained at and before the trial that the witness possessed the knowledge.

6. NEW TRIAL, § 68*—*when not granted on ground of newly-discovered evidence*. A new trial will not be granted on the ground of newly-discovered evidence where such evidence is cumulative.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Krayouska v. Spring Valley Coal Co., 205 Ill. App. 144.

Anton Krayouska, Appellee, v. Spring Valley Coal Company, Appellant.

Gen. No. 6,351. (Not to be reported in full.)

Appeal from the City Court of Spring Valley; the Hon. W. H. HAWTHORNE, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded. Opinion filed April 19, 1917.

Statement of the Case.

Action by Anton Krayouska, plaintiff, against the Spring Valley Coal Company, defendant, to recover damages for personal injuries received while working as a miner in defendant's coal mine. From a judgment for plaintiff for eight hundred dollars, defendant appeals.

MCDougall, Chapman & Bayne, for appellant; Martin & Sherlock, of counsel.

G. F. Wagner, for appellee.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. MINES AND MINERALS, § 186*—*when giving of instruction based on nonexistent statute as to duty of owner as to allowing employee to enter mine is reversible error.* In an action for personal injuries sustained by a miner who was struck by an empty car which from some cause ran down an incline without apparently being in charge of any servant of the defendant, where one of the counts charged violation of a statute making it the duty of defendant not to allow any employee to enter the mine in question or to work therein unless he did so under the direction of the mine manager, and such statute was no longer a part of the mining law, but an instruction had been given that plaintiff had a right to recover under the allegations of this count, *held* that inasmuch as it clearly appeared in

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Biederbeck v. Tucker, 205 Ill. App. 145.

the evidence that the defendant did allow plaintiff to enter the mine and work therein without being under the direction of the mine manager, the jury could properly infer from such instruction that the defendant had in such respect violated a duty required of it by law and that plaintiff had a right to recover on that ground, and as the verdict may have been based in whole or in part on such erroneous idea of the defendant's statutory duty, the giving of the instruction constituted reversible error.

2. MINES AND MINERALS, § 156*—*when admission of evidence as to custom of miners in operation of cars is erroneous.* In an action by a coal miner for injuries sustained by being struck by an empty car running down an incline in the coal mine, *held* that the admission of evidence concerning the habit of one of the miners to permit cars to run down the incline by force of gravity was erroneous.

Bert Biederbeck, Appellant, v. Robert Tucker, Appellee.

Gen. No. 6,354. (Not to be reported in full.)

Appeal from the County Court of Peoria county; the Hon. CHESTER F. BARNETT, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded. Opinion filed April 19, 1917.

Statement of the Case.

Action by Bert Biederbeck, plaintiff, against Robert Tucker, defendant, to recover one-half the expense of a fence built under the Fence Viewers' Act, sec. 8 (J. & A. ¶ 5708), and also the fees and reasonable expenses of the fence viewers. From a judgment based on a directed verdict in favor of defendant, plaintiff appeals.

O. P. WESTERVELT, CLARENCE W. HEYL and HARRY C. HEYL, for appellant.

R. H. RADLEY, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.
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Biederbeck v. Tucker, 205 Ill. App. 145.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. FENCES, § 12*—*when fence viewers have no authority to make appraisement of damages.* In an action to recover damages for building the defendant's portion of a division line fence which was erected by the plaintiff pursuant to the decision of fence viewers appointed under the Fence Viewers' Act, sec. 8 (J. & A. ¶ 5708), where it appeared that the notice limited the authority of the fence viewers to determining what proportion of the fence should be maintained by each owner, and damages were assessed without giving notice for the selection of fence viewers to make the appraisement of damages, *held* that the fence viewers originally selected could not legally make the appraisement of the damages, because they were not selected for that purpose under the original notice, and it was therefore necessary to give another notice to the defendant so that he would have the opportunity, which the statute contemplated, of selecting one of the fence viewers to make such appraisement.

2. FENCES, § 12*—*when fence viewers have no authority to determine character of fence to be built by parties.* Where a notice is given under the Fence Viewers' Act, sec. 8 (J. & A. ¶ 5708), for the purpose of determining the proportion of a division fence between lands which should be maintained by each owner, and the notice is limited to such purpose only, the fence viewers have no authority to determine the character of the fence to be built by the parties.

3. FENCES, § 6*—*when party erecting fence entitled to recover one-half of fees and expenses of fence viewers.* In an action to recover damages for building the defendant's portion of a division line fence which was erected by the plaintiff pursuant to the decision of fence viewers appointed under the Fence Viewers' Act, sec. 8 (J. & A. ¶ 5708), and also to recover the fees and reasonable expenses of the fence viewers, where it was determined that the plaintiff had no right to recover the cost of the fence because notice for the appointment of appraisers to appraise damages had not been given, *held* that the plaintiff was, however, entitled to recover one-half the amount paid by him for fees and reasonable expenses for the fence viewers which were incurred in determining the dispute as to the proportions of the fence to be maintained by the respective parties.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hayden v. Miller, 205 Ill. App. 147.

**Eugene Hayden, Appellant, v. Independence J. Miller,
Appellee.**

Gen. No. 6,357. (Not to be reported in full.)

Appeal from the Circuit Court of Peoria county; the Hon. CLYDE E. STONE, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 19, 1917.

Statement of the Case.

Action by Eugene Hayden, plaintiff, against Independence J. Miller, defendant, to recover the sum of \$725 which the plaintiff claims was borrowed from him by the defendant in four separate items. From a judgment for \$50 for one of such items, plaintiff appeals.

JOHN B. KING and LEO G. HANA, for appellant.

DAILEY & MILLER, for appellee.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. WITNESSES, § 253*—*when weight of evidence is question for jury.* In an action to recover money borrowed in various items, where plaintiff testified that none had been paid and the defendant testified that all but one item of \$50 had been paid, and where the verdict was for \$50 and plaintiff appealed, *held* that the weight of evidence could only be determined by passing on the question as to which of the parties was more worthy of belief, and that this was a question for the jury.

2. APPEAL AND ERROR, § 1411*—*when verdict based on conflicting evidence not disturbed as against weight of evidence.* In an action to recover money borrowed in four items, where the plaintiff and the defendant testified diametrically opposite to each other on the ques-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Billburg v. Schmid, 205 Ill. App. 148.

tion of payment of three of the items, *held* that the court could not say that the verdict for plaintiff for only one of the items was against the weight of the evidence, nor that the jury should have believed the plaintiff instead of the defendant.

3. EVIDENCE, § 475*—*what constitutes preponderance of*. It does not follow as a matter of law that because two witnesses testify diametrically opposite each other concerning a matter in dispute that there is no preponderance of the evidence, but the preponderance is established when it is legally ascertained which of the two witnesses testified to the truth.

4. INSTRUCTIONS, § 50*—*when instruction on credibility of witnesses not erroneous*. In an action to recover borrowed money, where the testimony of plaintiff and defendant as to the payment of various items was diametrically opposite, *held* that an instruction concerning the credibility of witnesses and the testimony of parties to the suit, although peculiar in language and not free from criticism, was not erroneous and could not have misled the jury.

A. W. Billburg, Appellant, v. August Schmid, Appellee.

Gen. No. 6,375. (Not to be reported in full.)

Appeal from the County Court of Rock Island county; the Hon. NELS A. LARSON, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded. Opinion filed April 19, 1917.

Statement of the Case.

Action by A. W. Billburg, plaintiff, against August Schmid, defendant, to recover a sum of money alleged to have been taken by defendant as constable from the premises of plaintiff. From a judgment against plaintiff for costs, he appeals.

PHILLIP H. WELLS and DIETZ & SINNETT, for appellant.

J. T. & S. R. KENWORTHY, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 469***—*when remarks in presence of jury not assignable as error.* Misconduct of a party and a third person consisting of remarks derogatory to the other party in the presence and hearing of the jury during the temporary absence of the trial judge cannot be assigned as error where the attention of the trial judge was not called to such misconduct, so as to enable the court to counteract whatever prejudicial effect the making of such remarks might have had upon the jury.

2. **SHERIFFS AND CONSTABLES, § 80***—*when evidence insufficient to sustain verdict for defendant in action for money taken from plaintiff.* In an action against a constable for money claimed to have been taken from the premises of the plaintiff, where it appeared that the defendant, while serving a search warrant, possessed himself of a large part of such money and that, although he did not claim the money as his own, or that he had any other right to it, he refused to return it to the defendant on the ground that he did not know to whom it belonged and that a party other than the plaintiff also claimed it, *held* that if such other party had made any legal claim for the money and the defendant had really been in doubt a bill of interpleader should have been filed, or he should have produced such other party as a witness, and that the verdict in favor of the defendant was against the weight of the evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Clarence E. Higgins, by Grace Higgins, Conservator,
Appellant, v. Midland Casualty Company, Appellee.**

Gen. No. 6,878.

1. **INSURANCE—when injury not due to accident.** In an action to recover upon an accident insurance policy, under the terms of which recovery could only be had if the injury was the result of accident, and where it appeared that the injured person suffered sunstroke while on duty in the usual way as a traffic policeman, *held* that the sunstroke was not due to accident and that the court properly directed a verdict for the defendant.

2. **INSURANCE—when burden of proof is on plaintiff.** In actions upon accident insurance policies, the plaintiff assumes the burden of showing that the injury was sustained through accidental means.

Appeal from the Circuit Court of Winnebago county; the Hon. ARTHUR H. FROST, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 19, 1917.

B. JAY KNIGHT and KARL J. MOHR, for appellant.

R. K. WELSH and CLELAND, LEE & PHELPS, for appellee; MCKENZIE CLELAND, of counsel.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

The appellant, Clarence E. Higgins, by Grace Higgins, his conservator, brought this suit against the appellee, Midland Casualty Company, to recover a weekly indemnity under the provisions of an accident insurance policy issued to the appellant by the appellee on June 20, 1912. The accident alleged was a sunstroke, which it is claimed the appellant suffered on June 4, 1913. It appears from the evidence that the appellant was a traffic policeman in the City of Rockford, and on the day in question he was stationed on the corner of Main and State streets in that city, and

in the usual and customary way was performing his duties as policeman in regulating the street traffic at the time he was stricken.

To entitle the appellant to recover, it was necessary to show, under the terms of the policy, that the injury suffered by him which caused his disability, namely, the sunstroke, was the result of accidental means. The proof, however, is to the effect that the sunstroke was not sustained by him through accidental means; that it came in the usual order of nature and was the result of ordinary physical conditions; and that it came to him while he was pursuing his avocation in the usual way, and, apparently, as he always had. A sunstroke suffered under these circumstances cannot be regarded as accidental any more than a stroke of apoplexy could be so regarded; neither does the fact that it was unexpected and unforeseen make it accidental. In the *Semancik* case, in which the insured died from sunstroke, the Pennsylvania Superior Court pointedly states the rule governing cases where recovery is sought under similar provisions in insurance policies: "The plaintiff assumes the burden of showing that her husband died from sunstroke, and that this was effected through external, violent and purely accidental means. * * * Voluntary exposure to heat or cold, with a knowledge of the existing conditions and action by the insured in an intended and ordinary manner, under such circumstances resulting in bodily injury, does not present a state of facts on which the court can, with confidence, declare that such injury was effected by accidental means, although the injury was accidental, in that it was not designed nor anticipated. * * * There was manifestly an intention to make the policy cover cases of sunstroke, freezing and hydrophobia, only when some accident was the means of the injury." (*Semancik v. Continental Casualty Co.*, 56 Pa. Super. Ct. 392.)

Town of Magnolia v. Kays, 205 Ill. App. 152.

While it is true that the Supreme Court of Texas, by its decision in *Bryant v. Continental Casualty Co.*, 182 S. W. 673, apparently reached a different conclusion, yet the weight of authority is in accordance with the rule as stated in the *Semancik* case. *Dozier v. Fidelity & Casualty Co. of New York*, 46 Fed. 446; *Herdic v. Maryland Casualty Co.*, 146 Fed. 396; *Sinclair v. Maritime Passenger Assur. Co.*, 3 Ellis & Ellis 478; *Continental Casualty Co. v. Pittman*, 145 Ga. 641, 89 S. E. 716.)

We conclude, therefore, that the court properly directed a verdict for the appellee, and the judgment is affirmed.

Judgment affirmed.

Town of Magnolia, Appellant, v. Mark Kays, Appellee.

Gen. No. 6,258. (Not to be reported in full.)

Appeal from the County Court of Putnam county; the Hon. IRVING E. BROADDUS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 19, 1917.

Statement of the Case.

Action by the Town of Magnolia, on the complaint of Amos B. Wilson, plaintiff, against Mark Kays, defendant, under the provisions of the Roads and Bridges Act of 1913, secs. 151, 155 [Cal. Ill. St. Supp. 1916, ¶¶ 10000(151), 10000(155)], to recover the penalty therein provided for the obstruction of a public road. From a judgment against Amos Wilson for costs of the action, said Wilson appeals.

GEORGE W. HUNT, for appellant.

HENRY E. JACOBS and JAMES E. TAYLOR, for appellee.

TOWN OF MAGNOLIA v. KAYS, 205 Ill. App. 152.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. ROADS AND BRIDGES, § 7*—*when evidence insufficient to show existence of public road.* In an action under the Roads and Bridges Act of 1913, secs. 151, 155 [Cal. Ill. St. Supp. 1916, ¶¶ 10000(151), 10000(155)], to recover the penalty for obstructing a public road, record of proceedings at a meeting of the highway commissioners at which the strip in question was attempted to be set aside as a public road, and facts regarding the use of such strip considered, and *held* that the evidence failed to establish the existence of a public road.

2. ROADS AND BRIDGES, § 199*—*when no liability arises for obstruction of road.* In an action under the Roads and Bridges Act of 1913, secs. 151, 155 [Cal. Ill. St. Supp. 1916, ¶¶ 10000(151), 10000(155)], to recover the penalty for obstructing a public road, where the charge was that the defendant obstructed a "public road," *held* that if the defendant did not obstruct a public road he could not become liable, whatever private rights he might have invaded.

3. ROADS AND BRIDGES, § 25*—*when public road not established by dedication.* In an action to recover the penalty for a violation of the Roads and Bridges Act of 1913, secs. 151, 155 [Cal. Ill. St. Supp. 1916, ¶¶ 10000(151), 10000(155)], by obstructing a public road, where it appeared that certain owners had agreed between themselves as to the use of the land in question for a public private road, and the agreement was acted upon and a lane fenced out, but that the way was not used by the general public to any considerable extent, and did not have the appearance of a public road, and was at times closed at both ends by gates, *held* that there was no establishment of a public road by dedication.

4. ROADS AND BRIDGES, § 29*—*necessity of acceptance of way.* A way cannot become a public road by dedication of the owner without something being said or done by way of acceptance by the public authorities.

5. COSTS, § 77*—*when individual suing in name of town liable for on appeal.* In an action to recover the penalty provided by statute for obstructing a public road, where the action was brought in the name of a town on the complaint of a particular individual, and such individual assumed in the whole proceedings that he was the actual plaintiff and gave a bond for costs, and his appeal bond was drafted on that theory, and the finding was for the defendant and a judgment for costs was entered against such individual plaintiff, *held* that such individual was liable for costs under his costs bond.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Spiller et al. v. Ensign, 205 Ill. App. 154.

Clarence Spiller and Laura Spiller, Appellees, v.
Charles B. Ensign et al. Charles B. Ensign, Ap-
pellant.

Gen. No. 6,321. (Not to be reported in full.)

Interlocutory appeal from the Circuit Court of Grundy county; the
Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in this court. Af-
firmed. Opinion filed April 19, 1917.

Statement of the Case.

Bill by Clarence Spiller and Laura Spiller, plain-
tiffs, against Charles B. Ensign, First National Bank
of Gardner and W. G. Howell, defendants, praying for
the surrender and cancellation of a note of plaintiffs
then in possession of said bank, where it had been sent
for collection, and for an injunction restraining the
bank from parting with possession of the note to the
assignee thereof, defendant Ensign, during the pend-
ency of the suit. From an order denying motion of
defendant to dissolve the temporary injunction
granted, defendant appeals.

FELSENTHAL & WILSON, for appellant; DAVID LEVIN-
SON, of counsel.

FRANK H. HAYES, for appellees.

MR. JUSTICE CARNES delivered the opinion of the
court.

Abstract of the Decision.

1. INJUNCTION, § 384*—*when merits of case not passed on.* The
merits of the case are not passed on in considering the propriety of
granting or dissolving a preliminary injunction.

2. INJUNCTION, § 11*—*what is important consideration in deter-*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same
topic and section number.

Spiller et al. v. Ensign, 205 Ill. App. 154.

mining propriety of granting or dissolving preliminary injunction. In considering the propriety of granting or dissolving a preliminary injunction, an important inquiry is the relative inconvenience to be caused the parties if on final adjudication it appeared that the court should not have entered the order.

3. INJUNCTION, § 177*—*when allegations of fact insufficient.* Allegations of fact relied on in support of a bill for injunction should rest on clear averments and not on inference.

4. INJUNCTION, § 384*—*when assignments of error as granting injunction disregarded.* Where, on an application for an interlocutory injunction to restrain an assignee of a note charged with notice of its fraudulent character from obtaining possession of such note while held by a bank for collection, a temporary injunction issued without notice and the prayer and order for appeal were only from the order denying the motion to dissolve, *held* that assignments of error directed to alleged error in granting the injunction would be disregarded.

5. INJUNCTION, § 50*—*when order refusing to dissolve temporary injunction against obtaining possession of note by assignee not disturbed.* On an application to restrain the defendant, as assignee of a note charged with notice of its fraudulent character, from obtaining possession of such note, where it was contended that the note having been purchased before maturity and past due when the bill was filed, a court of equity would not interfere because the defendant could not cut off defenses by an assignment of the note, *held* that the order refusing to dissolve the injunction should not be disturbed.

6. INJUNCTION, § 11*—*when order refusing to dissolve temporary injunction not disturbed.* Where, on an application for a temporary injunction to restrain the collection of a note by an assignee charged with notice of its fraudulent character, it appeared that the defendant would not be deprived of any right while the note was impounded, while on the other hand the complainant might be put to loss if the defendant were permitted to get possession of the note, *held* that the order refusing to dissolve the injunction should not be disturbed.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Carlson v. Chicago Great Western R. Co., 205 Ill. App. 156.

Gus Carlson, Appellee, v. Chicago Great Western Railroad Company, Appellant.

Gen. No. 6,349. (Not to be reported in full.)

Appeal from the Circuit Court of Kane county; the Hon. MAZZINI SLUSSER, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded. Opinion filed April 19, 1917.

Statement of the Case.

Action by Gus Carlson, plaintiff, against the Chicago Great Western Railroad Company, defendant, to recover for personal injuries received while working as a section hand for defendant. From a judgment for \$5,000 in favor of plaintiff, defendant appeals.

JOHN A. RUSSELL, for appellant.

C. HELMER JOHNSON, LEONARD MEAD and JULIUS C. MATTHISON, for appellee; JAMES D. POWER, of counsel.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 98*—*when federal law controlling in action for personal injuries.* In actions by an employee against the employer for personal injuries, where both are engaged in interstate commerce, the federal statute must be applied.

2. MASTER AND SERVANT, § 302*—*when defense of assumed risk not excluded.* In an action against an interstate railroad where it is not claimed that any violation of a federal statute enacted for the safety of employees contributed to the injury, the defense of assumed risk is not excluded.

3. NEW TRIAL, § 109*—*what considered on motion for.* Although the trial court could not under the evidence direct a verdict for the defendant on the ground that such evidence would not sustain a ver-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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dict for the plaintiff, that question is before the court on a motion for a new trial.

4. INSTRUCTIONS, § 135*—*when should be offered.* Where a defendant fears that an instruction which informs the jury as to the charges in the declaration, without stating that those charges were denied by the defendant, is misleading, he can protect himself by offering an instruction to that effect.

5. MASTER AND SERVANT, § 206*—*when railroad engaged in interstate commerce liable for negligence of fellow-servant of employee.* In an action for personal injuries sustained by a railroad employee while engaged in interstate commerce, where the plaintiff, while pulling a spike, was thrown from a bridge as a result of the alleged negligent act of a fellow-servant, and the plaintiff claimed that he did not assume the risk of the negligence of such fellow-servant, *held* that the defendant was not liable in the absence of affirmative showing that such fellow-servant was guilty of negligence which was the proximate cause of the injury.

Mary Sabol, Appellee, v. Joseph G. Heintz et al.,
Appellants.

Gen. No. 6,364. (Not to be reported in full.)

Appeal from the Circuit Court of Will county; the Hon. FRANK L. HOOPER, Judge, presiding. Heard in this court at the October term, 1916. Affirmed in part, reversed in part and remanded with directions. Opinion filed April 19, 1917.

Statement of the Case.

Bill in equity by Mary Sabol, complainant, against Joseph G. Heintz, John J. Wellnitz and Joliet Trust & Savings Bank, a corporation, defendants, to subject the premises of the defendants Joseph G. Heintz and John J. Wellnitz to the payment, as provided in section 10 of the Dramshop Act (J. & A. ¶ 4610), of a judgment of eight hundred dollars obtained under

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Sabot v. Heints, 205 Ill. App. 157.

section 9 of the Act (J. & A. ¶ 4609), against Robert McMillin, a saloon keeper and tenant of such premises. From a decree for complainant subjecting the said premises to the payment of the judgment, subject to the lien of a trust deed held by defendant bank, for the payment of as much as was unpaid on the notes secured by the trust deed and ordering the sale of the premises subject to the lien of the trust deed for the payment of as much money as was unpaid on the notes secured thereby, defendants Heintz and Wellnitz appeal.

SNAPP, HEISE & SNAPP, for appellants.

COWING & KING, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. INTOXICATING LIQUORS, § 260*—*when lien against property of owner of rented premises for judgment against saloon keeper enforceable.* The lien provided by section 10 of the Dramshop Act (J. & A. ¶ 4610), subjecting premises rented for saloon purposes to the payment of a judgment obtained against the saloon keeper under section 9 of the Act (J. & A. ¶ 4609), is enforceable in equity, as the proceeding is not one taken to enforce a penalty.

2. INTOXICATING LIQUORS, § 260*—*when cause of action to subject property of saloon keeper to payment of judgment accrues.* In a chancery proceeding to subject premises rented for saloon purposes to the payment of a judgment against the saloon keeper, as provided in section 10 of the Dramshop Act (J. & A. ¶ 4610), where it was contended that the proceeding, being one to enforce a penalty, was barred by the Two-Year Statute of Limitations, which began to run from the time the cause of action accrued against the saloon keeper, *held* that the cause of action against the property of the defendants did not accrue under said section until after the judgment had been obtained in the common-law suit, as the causes of action were distinct.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

3. INTOXICATING LIQUORS, § 260*—*what are considered as adjudicated matters in equity proceedings to subject rented saloon premises to judgment against saloon keeper.* In equity proceedings to subject premises rented for saloon purposes to the payment of a judgment against the saloon keeper, as provided in section 10 of the Dramshop Act (J. & A. ¶ 4610), the facts as to sales of liquor and consequent damages to the complainant are considered adjudicated in the common-law suit, and cannot be controverted in the equity suit.

4. INTOXICATING LIQUORS, § 260*—*what must be proved in equity proceedings to subject rented saloon premises to judgment against saloon keeper.* In equity proceedings to subject premises rented for saloon purposes to the payment of a judgment against the saloon keeper, as provided in section 10 of the Dramshop Act (J. & A. ¶ 4610), the proof must show that the saloon keeper was selling intoxicating liquor in the premises of the owner at the time in question.

5. INTOXICATING LIQUORS, § 260*—*when decree in equity proceedings to subject premises rented for saloon purposes to judgment against saloon keeper is erroneous.* In equity proceedings to subject premises rented for saloon purposes to the payment of a judgment against the saloon keeper, as provided by section 10 of the Dramshop Act (J. & A. ¶ 4610), where the holder of a trust deed was made a party, and the decree provided for a sale subject to the lien "for the payment of so much money as may be unpaid on the note secured thereby," *held* that such decree improperly left the holders of the incumbrance without remedy as to any lien provided in case the trustee should be compelled to pay taxes, expenses of foreclosure and other sums secured or provided in the trust deed.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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William Blair and John Patten, Administrators, Appellees, v. Chicago, Ottawa & Peoria Railway Company, Appellant.

Gen. No. 6,365.

1. **CARRIERS, § 428***—*when passenger riding on platform guilty of contributory negligence.* In an action to recover for the death of a passenger who, while standing on the platform of an interurban car going at the rate of about thirty miles per hour, in some way fell through an opening left by an open vestibule and trapdoors as the car approached the station at which the deceased was to alight, where it appeared that there was room inside the car and there was a printed notice posted in the vestibule informing passengers that they were not allowed to ride on the platform or steps, *held* that plaintiff's intestate was guilty of contributory negligence.

2. **CARRIERS, § 386***—*when not guilty of negligence in leaving trapdoors of car open.* In an action to recover for the death of a passenger who, while standing on the platform of an interurban car going at the rate of thirty miles per hour, in some way fell through an opening left by open trapdoors as the train was approaching the station at which the deceased was to alight, where it appeared that there was room inside the car and a notice was posted in the vestibule informing passengers that they were not permitted to stand on the platform or steps, *held* that the defendant was not guilty of negligence.

Appeal from the Circuit Court of Will county; the Hon. FRANK L. HOOPER, Judge, presiding. Heard in this court at the October term, 1916. Reversed with finding of facts. Opinion filed April 19, 1917.

SNAPP, HEISE & SNAPP, for appellant.

FRANK H. HAYES and JOHN W. DOWNEY, for appellees.

MR. JUSTICE CARNES delivered the opinion of the court.

This is an appeal by the Chicago, Ottawa & Peoria Railway Company from a judgment of \$4,500 obtained

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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by the appellees, William Blair and John Patten, administrators, for the death of their intestate, James Patten, while a passenger on appellant's interurban car August 28, 1913, caused by falling from the rear platform of the car.

Before the time in question James Patten, about sixty-five years of age, lived on a farm about two miles northeasterly from the City of Morris, and had lived there many years. On that day there had been a home-coming celebration at Morris attended by many people. He went there from his home in one of appellant's cars, and started from Morris to so return about six o'clock p. m. The car which he boarded was a large interurban car with a rear inclosed platform, made to be opened and closed at the sides by vestibule doors and trapdoors in the usual manner of construction of that kind of vestibule. The car had two compartments, the smoker being in front. When Patten got on the car there was no one standing inside in the aisle. The seats of the rear compartment were mostly occupied, but there was room for two or three more passengers to sit there. There was also room in the front or smoking compartment for more passengers to sit. There was a printed notice posted in the vestibule informing passengers that they were not allowed to ride on the platform or steps of the cars. Patten and four others remained on the platform apparently without investigating whether there were or not seats inside. Probably Patten did not care to sit, and quite likely a vacant seat would not be observed by a careless glance inside, but it would have been apparent that the aisle was empty. It was a commercial railway, organized under the general railroad act, running easterly from Princeton and other points through Ottawa and Morris to Joliet, doing a passenger, freight and express business.

The conductor collected Patten's fare after the car

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left Morris without objecting to his or the other passengers standing on the platform. The car made frequent stops in the cities and towns through which it passed and at various places in the country, after the manner of interurban cars. After leaving Morris two or three of the next stops were to let passengers off at the south side of the car, and the vestibule door and trapdoor to the south were left open. As the car was nearing the point at which Patten was to alight, it was running at a speed of thirty or forty miles an hour, and Patten in some way fell through this opening and received injuries from which he soon died. Appellee's theory is that he must have thought because of the speed of the car that it was not going to stop at his crossing, and that he started to attract the conductor's attention and ask him to stop there, and in so doing fell. It is not clear from the testimony of the passengers on the platform how or why he fell. The road was straight and the rails and bed in good condition. There was no unusual motion of the car and nothing to account for his falling except that he stepped too near the edge of the opening and lost his balance.

Appellees in their argument here urge as negligence of appellant that the car was running at a high and dangerous rate of speed; that the doors at the south side of the vestibule were left open, and say that the high rate of speed and failure to close the vestibule doors and running the cars at such rate of speed approaching the station were the proximate cause of the injury. The declaration counted on such alleged negligence, and averred due care on the part of the plaintiff's intestate. The general issue was pleaded.

Appellant strongly insists that under the above state of facts James Patten was negligent as matter of law, and that the court erred in overruling its motion to direct a verdict, and quotes from Thompson on Negligence, vol. 3, sec. 2947:

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“The general rule is that if a passenger elects to ride upon the platform of a steam railway car without any necessity, real or apparent, for taking that position, and while so riding is injured under such circumstances, that he would not have been injured if he had not taken that position, he cannot recover damages from the company. In other words, for a passenger to ride in a position of such obvious danger, without any real or apparent necessity for so doing, is generally regarded as negligence *per se*.”

And sec. 2949:

“A real or apparent necessity would excuse the passenger in so riding, and repel the imputation of contributory negligence so that if, while so riding, he is injured through the negligence of the carrier, he may recover damages. The real necessity for riding in such a position is generally held to exist where the cars are so crowded that the passenger cannot secure standing room inside.”

and cites *Quinn v. Illinois Cent. R. Co.*, 51 Ill. 495, where the court held that a passenger voluntarily placing himself upon the steps of the platform of a car, holding onto the railing while there was abundant room in the car, even though the seats were full, and fell to the ground, not in consequence of a collision, or broken rail, or other fault of the company, was grossly negligent, and quoted with approval from a New York case: “If a man places himself in such position that in the ordinary movement and conduct of the train he is exposed to danger, he may justly be said to be negligent of his security, and must take the consequences if he is injured.” [*Willis v. Long Island R. Co.*, 32 Barb. 399.] This case was cited in *Chicago & A. R. Co. v. Fisher*, 141 Ill. 614, 628, and distinguished on the ground that in the *Quinn* case, *supra*, there was abundant room in the cars, and the deceased voluntarily and without any necessity therefor placed himself upon the platform of a car, although in the *Quinn*

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case there was not so abundant room in the car as in the present case. It was also cited by this court in *Savage v. Illinois Cent. R. Co.*, 164 Ill. App. 634, where the authorities on the question of a passenger's negligence in riding upon the platform were very fully reviewed and the court reached the conclusion that except under special circumstances a passenger is negligent if he rides or goes upon the platform of a coach while the train is traveling between stations, and if he is injured because of his presence upon the platform while the train is running, the carrier is not liable, and reversed without remanding a judgment in favor of the plaintiff for damages for the death of a person riding upon a coach platform.

It is said in 6 Cyc. 652, that a passenger who rides in a place not intended for passengers, and which is more dangerous than the place where passengers are permitted to ride, is thereby charged with contributory negligence. *Ohio & M. Ry. Co. v. Allender*, 47 Ill. App. 484, is cited in support of the text. It was there held that a person voluntarily going upon the front platform of the express car in a given train takes upon himself the hazard of his voluntary act, which imposes upon him the exercise of a degree of care commensurate with the risk voluntarily assumed in the ordinary and usual running of the train. In the text of 6 Cyc. 653, we find: "To ride on the platform of a railroad car while the train is in rapid motion is usually treated as negligence *per se*, such as to defeat recovery for injuries received by reason of riding in such position; but there are cases in which such an act is said not to be negligence *per se*, even where there is no particular excuse for it. And where the car is so crowded that there is no reasonable accommodation inside, the act of riding on the platform is treated as not negligent. As, therefore, the question of the propriety of riding on the platform depends on circumstances, it is prop-

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erly for the jury." Extensive notes on the question are found in 29 L. R. A. (N. S.) 325, and L. R. A. 1915B 166. These cases and authorities are dealing with commercial railroads operated by steam power. In the present case we have a commercial road not operated by steam power, occupying an intermediate position between the older commercial roads and the street car, with functions and duties partaking of the nature of each. It is said in 6 Cyc. 654: "As to street cars, the rule as to riding on the platform is more liberal, and it is generally said not to be negligence *per se* to do so." *North Chicago St. R. Co. v. Baur*, 179 Ill. 126, is cited in support of the text. In that case it was said there was no regulation of the railway prohibiting passengers from riding on the platform, but it appeared that other passengers did so ride without objection on the part of those in charge of the car; therefore, that the fact that plaintiff was standing on the platform when injured was not such negligence as would preclude a recovery; that it was a question of fact for the jury to determine from all the facts and circumstances surrounding the transaction. The court said we cannot denude ourselves of the knowledge, which is alike common to all, that passengers are constantly riding upon these platforms with the tacit assent of the defendant and without any posted notice or regulation. It was also held in *Chicago Union Traction Co. v. Lawrence*, 113 Ill. App. 269, that it is not negligence *per se* for a passenger to ride upon the platform of a street car.

We will not extend this opinion by discussing a great number of other authorities that may be readily found following the lines above indicated. We do not think it can be said as matter of law that it is negligence under any and all circumstances to ride on the platform of a moving car. The trial court could not direct a verdict for the defendant on the ground that

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it was negligence *per se* for the plaintiffs' intestate to ride on that platform, and he could not direct a verdict because the preponderance of the evidence in this case was that it was negligence for him to do so, or that the defendant was not negligent. If there was any fair question as to the conclusion to be drawn from the evidentiary facts, he was bound to submit it to the jury. But he was charged with the duty to grant a new trial if, in his opinion, the verdict of the jury was manifestly against the weight of the evidence, and it is our duty to examine the case on the facts and not accept the conclusion of the jury if, in our judgment, it is manifestly against the weight of the evidence.

We do not see how under the admitted facts the defendant can be held negligent. Proof was offered by the defendant that it was usual and customary in the operation of such cars to leave one of the vestibule doors open. Objection of the plaintiffs to this proof was sustained, perhaps properly. But it is almost, if not quite, a matter of common knowledge that one door of a car making frequent stops is usually left open, and unless some special reason appeared for shutting it between stops, and none did here appear, a jury would not be warranted in finding that act negligence; neither were the jury warranted in finding that the rate of speed at which the car was running negligence, even though it was approaching the point at which it was to stop for plaintiffs' intestate to alight. We think it quite as clear that the defendant was not negligent as that plaintiffs' intestate was negligent. Other prudent men might have stood upon the platform under similar circumstances, but if it is conceded that they might do so they still would be required to exercise a degree of care commensurate with the known danger. The conclusion cannot reasonably be reached that the defendant was negligent in leaving the door open, and that the plaintiffs' intestate was not

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negligent in not guarding himself against the obvious danger.

We conclude that the judgment should be reversed on the ground that the verdict is manifestly against the weight of the evidence; and as there is no reason to presume the facts would appear other or different on another trial, the cause is not remanded.

Reversed with finding of facts.

Finding of facts: We find that the defendant was not guilty of any negligence causing or contributing to the death of the plaintiffs' intestate, and that he at the time in question was not in the exercise of ordinary care for his own safety.

Oscar M. Kiess, Appellee, v. Block & Kuhl Company, Appellant.

Gen. No. 6,367. (Not to be reported in full.)

Appeal from the County Court of Peoria county; the Hon. CHESTER F. BARNETT, Judge, presiding. Heard in this court at the October term, 1916. Reversed. Opinion filed April 19, 1917.

Statement of the Case.

Action by Oscar M. Kiess, plaintiff, against Block & Kuhl Company, defendant, to recover on a contract for commissions for selling victrolas in defendant's department store. From a judgment for plaintiff for \$311.66, defendant appeals.

PAGE, HUNTER, PAGE & DALLWIG, for appellant.

J. E. DAILY and S. F. McGRATH, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

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Abstract of the Decision.

1. TRIAL, § 199*—*when direction of verdict improper*. Where the evidence is conflicting, it is improper for the trial court to direct a verdict, as it could not do so without weighing such evidence.

2. NEW TRIAL, § 109*—*what considered on motion for*. On a motion for new trial, the court is required to consider the weight of conflicting evidence and grant the motion, if in its opinion the verdict was manifestly against the weight of the evidence.

3. MASTER AND SERVANT, § 84*—*when evidence insufficient to sustain verdict for plaintiff in action to recover commissions*. In an action to recover commissions under a contract of employment providing for a weekly salary, and also commissions which were to be due and payable at the end of the employer's fiscal year, where it appeared that before the expiration of the year the plaintiff quit because he was offered a better position elsewhere, and three witnesses for the defendant testified that the right to commissions depended upon plaintiff's working for the fiscal year, as against the plaintiff alone who testified that his commissions were not made dependent on his working for the time specified, *held* that the verdict for the plaintiff was manifestly contrary to the evidence.

4. MASTER AND SERVANT, § 66*—*when employee entitled to commissions on sales*. Where, under a contract of employment an employee is to receive a certain commission upon sales made by him payable at the end of the employer's fiscal year, and the duration of the employment is not fixed, the fact that the employee quits before the expiration of the fiscal year does not of itself bar him from recovering commissions, but if the contract is to continue for the year, the employee cannot recover unless he fully performs his contract for the full term for which he was hired.

5. EVIDENCE, § 476*—*when testimony of one witness not to be given greater weight than that of opposing witnesses*. In an action for the recovery of commissions by an employee where three witnesses, as against the plaintiff alone, testified that the payment of such commissions was made dependent upon the employee working for the defendant for a time specified, and it appeared that the employee quit before the expiration of such period, *held* that although the number of witnesses alone did not control, it would be unreasonable that the testimony of the plaintiff alone should be allowed to outweigh that of the three witnesses to the contrary.

6. APPEAL AND ERROR, § 1805*—*when case reversed without remanding*. Where a verdict is contrary to the weight of evidence and another trial will not result in the production of different evidence, the case will be reversed on appeal without remanding.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Richard Smith, Appellee, v. Stover Manufacturing Company, Appellant.**Gen. No. 6,380.**

1. **APPEAL AND ERROR, § 438***—*when objection on ground of variance too late.* An objection on the ground of variance comes too late when made for the first time on appeal.

2. **APPEAL AND ERROR, § 438***—*when question of variance raised too late.* In an action on the case for damages for personal injuries, by an employee where the employer had elected not to provide and pay compensation under the Workmen's Compensation Act of 1913, and it was averred that the defendant was not operating under the provisions of the act and that notice in writing of its election was filed with the State Bureau of Labor Statistics, and the proof showed that a notice of election under section 2 of the Act [Cal. Ill. St. Supp. 1916, ¶ 5475(2)] was filed with the Industrial Board, and this variance between the pleading and proof was urged as ground for reversal, *held* that as the objection to a certified copy of the notice was not made on the ground of variance, the defendant was precluded from availing itself of the objection of variance on appeal.

3. **WORKMEN'S COMPENSATION ACT, § 12***—*when evidence sufficient to show that accident occurred in State.* In an action by an employee for damages for personal injuries, where the defendant had elected not to provide and pay compensation, as required by section 2 of the Workmen's Compensation Act of 1913 [Cal. Ill. St. Supp. 1916, ¶ 5475(2)], and objection was made that the proof failed to show that the accident occurred in Illinois, and that therefore the court could not know whether the act was applicable, *held* that although it failed to appear that the city mentioned by witnesses as the place where the accident occurred was in Illinois, there was enough in the evidence to leave no question that appellant's factory was located and the accident occurred in such city.

4. **EVIDENCE, § 108***—*when experiments not competent.* Where the plaintiff in a personal injury case was injured while engaged in moving a heavy piece of machinery across a railroad track and over a plank bridge between two buildings of the defendant, and the defendant offered to prove by a witness that while the locality was in the same condition as on the day of the accident he took a machine exactly like the one in question and placed it on the bridge and took measurements of the depression caused thereby, *held* that experiments were not competent unless the circumstances under

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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which they were conducted were very similar to those connected with the act to be illustrated, and that such offer by the defendant had not brought the evidence within the rule stated.

5. EVIDENCE, § 378*—*when opinion of witness is not competent.* The question whether the place of an accident and the appliances used by a servant were reasonably safe are ultimate facts in issue and therefore the opinion of a witness on those questions is not competent.

6. EVIDENCE, § 279*—*when exclusion of skiagraph is of little importance.* Where, in a personal injury case, the plaintiff introduced a skiagraph of his injured arm and one of his uninjured arm, and sufficient foundation was thereafter laid for the introduction by the defendant of a skiagraph of a case somewhere near similar to the one in question, and an objection to the introduction of such skiagraph was sustained, but the witness was permitted to testify that skiagraphs did not represent true conditions of dislocated bones, and also to give other testimony as to the reliability of skiagraph pictures, *held* that under the circumstances it was of little importance whether the jury were or were not permitted to see pictures of other somewhat similar cases.

7. TRIAL, § 288*—*when error to assume that court is laying down proposition of law.* It is error to assume that a court, charged with the duty of passing on the facts of a case, is laying down a proposition of law in stating its opinion as to such facts.

8. APPEAL AND ERROR, § 1238*—*when party cannot complain of converting of proposition of fact into one of law.* A party who induces a court to convert a proposition of fact in an instruction into one of law in his favor cannot complain of such action.

9. APPEAL AND ERROR, § 1565*—*when modification of instructions not reversible error.* The practice of modifying instructions by erasures and interlineations is condemned, but *held* not to be reversible error.

10. WORKMEN'S COMPENSATION ACT, § 12*—*what must be averred and proved in action to recover for injuries sustained.* Although under section 3 of the Workmen's Compensation Act of 1913 [Cal. Ill. St. Supp. 1916, ¶ 5475(3)], an employer is deprived of various defenses which might have been available at common law, nevertheless negligence of the defendant must be averred and proved in an action to recover for injuries sustained.

11. WORKMEN'S COMPENSATION ACT, § 12*—*when instruction in action for personal injuries not misleading.* In an action by a servant to recover damages for personal injuries, where the defendant had elected not to provide and pay compensation under the Workmen's Compensation Act of 1913, an instruction stating that the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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plaintiff did not assume the risk incident to his employment, *held* not misleading as telling the jury that it was not necessary to prove the defendant's negligence.

12. APPEAL AND ERROR, § 1256*—*when refusal of instructions may not be assigned as error.* The refusal to give instructions which are covered by given instructions of the party complaining, in which refused instructions the law is stated less favorably to such party, cannot be assigned as error.

13. WORKMEN'S COMPENSATION ACT, § 12*—*when refusal of instruction in action for damages for personal injuries is proper.* In an action by an employee to recover damages for personal injuries, where the defendant had elected not to provide and pay compensation under the Workmen's Compensation Act of 1913, an instruction stating that if the jury found that the negligence of the plaintiff contributed to the accident they might consider such fact in arriving at the amount of damages to be assessed by defendant, and make it less than they would have made it but for the negligence of the plaintiff, *held* properly refused.

14. APPEAL AND ERROR, § 1622*—*when exclusion of evidence of witnesses unable to speak English intelligently is not reversible error.* In an action to recover for personal injuries, where two foreign witnesses who had not sufficient understanding of the English language to make their testimony intelligible were called by the plaintiff, and the reporter stated that he could not understand the witness, and defendant's counsel stated that he did not care to cross-examine, but objected to the testimony without its appearing in the record, and the court instructed the jury not to consider the testimony of such witnesses, *held* that there was no reversible error in such proceeding.

15. APPEAL AND ERROR, § 1236*—*when party may not complain of error in statement of opposing counsel as to making of stipulation.* Where, in a personal injury case, the defendant's attorney, in proceeding to impeach the testimony of a witness, produced a transcript of the testimony of such witness taken at a former trial and stated that it was stipulated to be a true and correct transcript taken by the official reporter, and thereupon offered the questions and answers appearing in the transcript, and an objection by the plaintiff was sustained on the ground of it not being proper impeachment, and on appeal the plaintiff urged that it did not appear that he had joined in the stipulation referred to by defendant's attorney, *held* that the plaintiff should not be heard to so contend after permitting the statement regarding the stipulation to be made without objection.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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16. APPEAL AND ERROR, § 1495*—*when exclusion of impeaching testimony harmless error.* Where, in a personal injury case, impeaching testimony which tended to show that on a former trial a physician was not positive that the condition of the plaintiff came from the injury in question was excluded, *held* that such exclusion was harmless error, as there was no question but that the plaintiff was seriously and permanently injured, and other proof made it certain that there was no former injury.

Appeal from the Circuit Court of Stephenson county; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 19, 1917.

CHARLES H. GREEN, for appellant.

C. W. MIDDLEKAUFF, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Richard Smith, the appellee, thirty-nine years old, thirteen years in the employ of Stover Manufacturing Company, the appellant, earning about \$10 a week, was on February 11, 1915, while so employed, injured when he, with three coemployes, was engaged in moving an ensilage cutter, a heavy piece of machinery, from one of appellant's buildings to another. Appellant had elected not to provide and pay compensation according to the provisions of the Workmen's Compensation Act of 1913 (Hurd's Rev. St. ch. 48, § 126 *et seq.*, Cal. Ill. St. Supp. 1916, ¶ 5475(1) *et seq.*) and given notice of such nonelection as required by section 2 of that Act Cal. Ill. St. Supp. 1916, ¶ 5475 (2). This action on the case was brought to recover for that injury. Plaintiff had judgment on a verdict of \$2,500, from which the defendant appeals.

The ensilage cutter weighed from fifteen hundred to two thousand pounds, was four and one-half feet high, two and one-half or three feet wide, and eight feet

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

long. The workmen were attempting to move it by using two dollies, one with a single wheel at the front attached to the cutter and turning like a castor. The other a two-wheel dolly, at the rear, a board two and one-half to three feet long with two wheels not attached, but set under the cutter. They were required to cross over a railroad switch track between two buildings. This space was spanned by a loose plank bridge about ten feet long, made of six planks each between ten and twelve inches wide and two inches thick. The approach to the bridge was of cement with a depression at the edge which the ends of the planks were designed to fit into. There was no support between the ends of the planks. After the dollies were placed under the cutter, four workmen, appellee, Amos Ditzler and two Greeks, proceeded to take it towards the bridge. Appellee was stationed at the one-wheel dolly in front, and steered the course. The other three workmen were behind the machine, pushing. They proceeded through one factory and onto a platform, adjacent to the bridge. When the four workmen approached this bridge they met another workman coming with a wheelbarrow load of material. They turned to one side to allow him to pass and then moved ahead with the cutter onto this plank crossing. Appellee went onto the crossing first, steering the single-wheel dolly. Before the two-wheel dolly and the other three workmen arrived at the crossing the single dolly and appellee were in the middle of the plank crossing. Appellee claims that the plank on which the single dolly rested bent down four to six inches, causing its end to rise above the cement surface, and that one of the two wheels of the rear dolly struck that and slipped back, and the other wheel rolled ahead upon the plank crossing; that he stooped down to move the wheel of the dolly onto the plank, when Ditzler and one of the Greeks pried up with a crowbar on the

other side of the cutter and it fell over onto him, breaking two bones in his left leg, the larger bone of his wrist, and tearing the ligaments which bind the small bone of the wrist to the large bone, inflicting serious and permanent injuries. The declaration in different counts charged as defendant's negligence that it provided no railroad track or smooth planks to move said cutter; that the plank bridge was negligently, carelessly and unskillfully constructed; that the defendant was negligent in employing laborers of a foreign nationality unable to speak the English language; that the laborers were not furnished with proper equipment for doing the work; that an employee of defendant pushed and pried the cutter over onto the plaintiff and that such employee was a foreign-born citizen and unable to speak the English language, and was unskilled and not a proper person to work about the moving of heavy machinery; that the defendant carelessly and negligently employed said laborers; that the laborers were provided with imperfect and insufficient tools and appliances to move the cutter; that the defendant failed to furnish a safe place in which the plaintiff should perform the moving of the cutter.

It was averred that at the time, etc., defendant was not operating under the provisions of "An Act to Promote the General Welfare of the People of this State by Providing Compensation for Accidental Injuries or Death Suffered in the Course of Employment Within this State," and that notice in writing of its election was filed with the State Bureau of Labor Statistics."

The proof showed that appellant's notice of election under section 2 of the Workmen's Compensation Act [Cal. Ill. St. Supp. 1916, ¶ 5475(2)] was filed with the Industrial Board, as there required, and not with the State Bureau of Labor Statistics, as averred in the declaration; therefore, there was a variance between

the pleadings and proof, which appellant urges as a ground for reversal. A certified copy of this notice was offered in evidence by appellee, and objected to on the ground that it was immaterial and not properly certified. The attention of the court was not called to its variance from the pleading. There is no question that it was properly certified and material if it had been properly pleaded. If the court's attention had been called to the real objection, we must presume it would have been obviated by an amendment of the declaration; therefore, appellant cannot here avail itself of the variance. (*Libby, McNeill & Libby v. Scherman*, 146 Ill. 540; *Ransom v. McCurley*, 140 Ill. 626; *Barth v. Hanna*, 158 Ill. App. 20.)

It is objected that the proof does not show that the accident occurred in the State of Illinois; therefore, that we cannot know that our Workmen's Compensation Act is applicable. The trial was at Freeport, Stephenson county, Illinois, and while it may be that it does not specifically appear in a single item of evidence that the Freeport often mentioned by the witnesses was Freeport, Illinois, yet there is enough in the evidence, taken altogether, to leave no question that appellant's factory was there located, and the accident there occurred.

Appellant offered to prove by R. M. Bennethum that some time after, and while the platform or bridge was in the same condition as on the day of the accident, he took an ensilage cutter exactly like the one in question and placed it on the bridge and took measurements as to the depression of the platform caused thereby. The court sustained an objection to that evidence, we think properly, on the authority of *Libby, McNeill & Libby v. Scherman*, 146 Ill. 540. That case is cited and the authorities quite thoroughly reviewed and discussed in *Fein v. Covenant Mutual Benefit Ass'n*, 60 Ill. App. 274, where an experiment was held admissible in evi-

dence; but the rule to be gathered from the cases is that experiments are not competent unless the circumstances under which they are conducted are very similar to those connected with the act to be illustrated. We do not think the offer in the present case brought the evidence within that rule. Appellee claims that one of the six planks upon which the wheel of the front dolly rested, and upon which appellee perhaps also stood, bent four to six inches. The entire cutter was not upon the bridge. It would not have aided this investigation to know that an entire cutter like the one in question might be placed on the middle of the bridge without causing so much depression of any single plank. See opinion of this court in *Upthegrove v. Chicago Great Western Ry. Co.*, 154 Ill. App. 460. The same witness, Bennethum, was shown to be familiar with the usual and customary appliances used in factories, warehouses and freight depots for hauling heavy objects, and with the two-wheel dolly and one-wheel dolly used by appellee, and was then asked by appellant whether such dollies are used in such places for such purposes, and whether the dollies in question were reasonably safe appliances for use at the time in question, and whether the platform (bridge) was a reasonably safe and proper method of connecting the two floorways. The court sustained objections to each of these questions. Whether the place and appliances were reasonably safe were ultimate facts in issue. The court did not err in rejecting the opinion of the witness on those questions. (*Keefe v. Armour & Co.*, 258 Ill. 28.)

On cross-examination, appellee was asked if he testified on a former hearing that he had moved ensilage cutters over those same planks and passageway before, and answered that he did not remember, but that he did not believe he had moved them before. A transcript of appellee's testimony taken on a former

trial was produced and appellant's attorney stated that it was stipulated to be a true and correct transcript of the testimony taken by the official reporter of the court. Appellant then offered questions and answers of appellee appearing in such transcript, from which it appeared that he did testify before that he had moved ensilage cutters over the same platform and passageway, which was objected to on the ground that it is not proper impeaching testimony, and the objection sustained. Counsel for appellee say here that it does not appear that appellee joined in the stipulation as to the transcript. We do not think he should be heard to say that, after hearing the statement made by appellant's counsel without objection. Dr. Snyder, a witness for appellee, was also sought to be impeached by a reading of his testimony offered at a former trial as to the exact nature of appellee's injury, and such impeaching testimony was rejected, and is justified here on the same ground. We think the impeaching testimony should have been admitted, but that it was not of sufficient importance so that its rejection should be held reversible error. Whether appellee had been accustomed to moving cutters over that platform and was therefore familiar with the method of doing the work and the danger went only to the question of his care when he was injured—whether he might be guilty of contributory negligence; but as contributory negligence is excluded as a defense, that question was not very material. Dr. Snyder's testimony varied from his former evidence slightly in matters that were technical and not likely to be well understood by the jury. The impeaching testimony tended to show that on the former trial the doctor was not positive that the condition came from the injury complained of. There is no question that appellee was seriously and permanently injured, and other proof makes it certain that there was no former

injury. We think there are no grounds for the presumption that the jury might have awarded less damages if the proof had been admitted. It is said in appellant's brief: "Plaintiff was severely injured by the accident * * *. His arm was broken and his leg was broken. He was at the hospital from February 11, 1915, to March 27, 1915. He stayed at home fifteen weeks before he was able to walk at all." While there is conflict in the testimony as to the extent of the permanent disability induced by the injury and its effect upon appellee's ability to work, in the future, the above-quoted statement is as favorable to appellant as the evidence warrants in any view of the case, and there is no ground for holding the damages assessed excessive.

Appellee introduced in evidence an X-ray skiagraph of his injured arm, and another of his uninjured arm. Appellant called a doctor as a witness, who stated that in his opinion appellee had comparatively full capacity for manual labor, and based that conclusion on similar conditions in other cases of fractures of a similar type in which there was approximately a similar condition. He said he had skiagraphs of such cases somewhere near being similar to the one in question. The court sustains an objection to the production of such a skiagraph for inspection by the jury, but the witness was permitted to testify that skiagraphs do not represent true conditions of displacements; that they are considered shadowgraphs and do not represent true conditions of dislocated bones, because in broken bones it seldom occurs that there is not some displacement and the focus—the point from which the X-ray emanates—is of pin-point size, and about the average of twelve to fifteen inches from the part to be photographed, and these rays diverge and produce distortion of the true condition; that he thought the injured ulna was not in a parallel plane with the surface of the radius, and

that it would somewhat interfere with appellee's capacity to do manual labor but not as much as the photograph of that type would indicate. It would seem that appellant got the benefit of whatever this witness knew about the reliability of a skiagraph picture, and that it was of little importance in this case whether the jury were or not permitted to see pictures of other somewhat similar cases. It was like many other instances in trials where the witness might or might not, in the discretion of the court, be permitted to illustrate his statements by pictures and objects at hand. Appellant cites the language of the court in *Kruger v. McCaughey*, 149 Ill. App. 444, as follows:

"While sufficient foundation was laid to permit the X-ray skiagraph of appellee's arm to be introduced in evidence, such skiagraph is by no means conclusive as to the conditions actually existing in the arm. The skiagraph is not a picture of the object or substance itself, but of the shadow merely which is cast by such object or substance, and the evidence discloses that the picture thus produced is frequently inaccurate and misleading owing to divergence and distortion. It is easily within the ability of a person operating an X-ray machine to magnify or minimize the appearance of an existing condition."

and assumes that the court was there announcing a proposition of law, and complains that the trial court would not observe it as such. The error of assuming that a court, charged with the duty of passing on the facts of a case, is laying down a proposition of law in stating its opinion as to such facts has been too many times pointed out by the Supreme and Appellate Courts to require citation of authorities. In this connection we may note that appellant's sixth instruction offered asked the court to inform the jury "that the X-ray skiagraphs of the plaintiff's injured arm introduced in evidence in this case are by no means conclusive as to conditions actually existing in his arm,"

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and the court modified the instruction so it would read that they "are not conclusive as to the conditions actually existing in his arm." This modification was made by erasures and interlineations, and the original instruction is certified here for our inspection, appellant claiming that it might have been misread by the jury to mean that the pictures in the case were conclusive as to the conditions actually existing, and that the instruction should have been given as offered. It should have been refused for the reasons above stated, and while the practice of modifying instructions by erasures and interlineations has been criticised by reviewing courts, it resulted in no harm here. The jury heard the instruction read as it appears in the record. We do not think they were misled by its inspection afterwards. The result was that appellant induced the court to convert a proposition of fact into one of law in its favor, and is in no position to here complain. So far as this record shows it was indisputably a fact, and no harm resulted to either party.

Under the Workmen's Compensation Act, sec. 3 [Cal. Ill. St. Supp. 1916, ¶ 5475 (3)], appellant was deprived of three defenses that might have been available at common law: First, that the employee assumed the risk of the employment; second, that the injury or death was caused in whole or in part by the negligence of a fellow-servant; third, that the injury or death was proximately caused by the contributory negligence of the employee. Appellant recognizes those provisions of that statute and correctly says that nevertheless negligence of the defendant must be averred and proven. Its counsel argues at length that the court did not so hold the law, and calls our attention to the instructions given and refused to support that argument. Appellant's first given instruction read as follows:

"The court further instructs you that before you

can find the defendant guilty, the plaintiff must prove by a preponderance of the evidence in this case that the defendant at the time of the accident did not furnish a reasonably safe platform on which the plaintiff was working, and did not use all reasonable precautions to keep and maintain such place in a reasonably safe condition, or did not furnish reasonably safe appliances, tools or equipments for moving the machinery which plaintiff was moving."

This not only informed the jury that appellant must be shown negligent in failing to furnish a safe platform or safe appliances, but withdrew absolutely from the jury the other allegations of negligence contained in the declaration in respect to employing fellow-servants that were unskilled and unqualified. It seems a complete answer to the argument that appellee obtained an unfair advantage from a mistaken view of the law entertained by the court. It put the whole question of appellant's negligence in a nutshell, and stated it more favorably to appellant than the law required.

The court at the instance of appellee instructed the jury that the plaintiff did not assume the risk incident to his employment with the defendant. Counsel argues that this was equivalent to telling the jury that it was not necessary to prove defendant's negligence, and undertakes to point out that there is a plain distinction between the proposition that the defendant is deprived of the defense of assumed risk, and that the plaintiff is not to be held as assuming the risk. We conclude that the jury could not have been misled by that statement of law, even if a technical difference might be discovered by jurists.

The court refused appellant's fourth instruction, which was framed to tell the jury that the master must be shown negligent in some act or omission that caused the injury, and that a verdict must be based upon some logical and reasonable theory; and its fifth instruction

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to inform the jury that the defendant must be shown to have failed to perform a duty which it owed the plaintiff. So far as either of these instructions was material it was covered by the given instruction above mentioned, and was less favorable to appellant than that. Defendant's sixth instruction was to inform the jury that if they found the negligence or carelessness of the plaintiff contributed to the accident they might consider that in arriving at the amount of damages to be assessed the defendant, and make it less than they otherwise would have made it but for said negligence of said plaintiff. The Workmen's Compensation Act of 1911-12 (J. & A. ¶ 5449) provided for proportioning damages in cases of contributory negligence of the plaintiff. We find no such provision in the Act of 1913; and know of no authority for applying that rule in the absence of such statutory provision.

The plaintiff called the two Greeks that were working with him as witnesses. They had not sufficient understanding of the English language so that their testimony was intelligible. The reporter stated that he could not understand the witness, and appellant's attorney said he did not care to cross-examine him, but objected to the testimony of those witnesses without its appearing in the record. The court said to plaintiff's attorney that if he wanted the testimony preserved he had better call an interpreter because the court did not think the reporter or jury understood what they said, and the court did not. Plaintiff's attorney then said that he offered the witnesses for the purpose of permitting the jury to ascertain their knowledge and lack of knowledge of the English language; whereupon the court instructed the jury not to consider the testimony of those witnesses and the plaintiff excepted. We see no error in this proceeding. The court seems to have followed the suggestion of appellant's counsel against the protest of appellee.

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If the production of those witnesses had an influence with the jury in determining the question whether appellant had employed incompetent help, appellant caused the court to remove that trouble by taking that issue from the jury by the defendant's instruction before mentioned. The question of defendant's negligence was properly left to the jury. We do not think their conclusion so unreasonable or manifestly against the weight of the evidence as to justify our reversing the judgment on that ground.

Finding no reversible error in the record, the judgment is affirmed.

Affirmed.

George E. Mann, Appellant, v. Amos B. Ahrens,
Appellee.

Amos B. Ahrens, Appellant, v. George E. Mann et al.,
Appellees.

Gen. No. 6,387. (Not to be reported in full.)

Appeal from the Circuit Court of Whiteside county; the Hon. EMERY C. GRAVES, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 19, 1917.

Statement of the Case.

Bill by George E. Mann, complainant, against Amos B. Ahrens, defendant, to restrain the collection of notes for corporate stock purchased of defendant and to obtain the cancellation thereof, and cross-bill by Amos B. Ahrens to enforce an alleged agreement for the release of a debt owed by cross-complainant to the corporation. From a decree dismissing the bill and cross-bill for want of equity, both parties appeal.

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STAGER & STAGER, HENRY C. WARD and McCALMONT & RAMSAY, for appellant Amos B. Ahrens.

A. A. WOLFERSPERGER, C. C. McMAHON and SHEEAN & SHEEAN, for appellees.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. FRAUD, § 59*—*what are prerequisites to relief against contract on ground of.* Equity will not grant relief against a contract on the ground of fraud unless such contract is at once repudiated on the discovery of the fraud and a tender to return what has been received is made.

2. CANCELLATION OF INSTRUMENTS, § 39*—*when dismissal of bill and cross-bill proper.* In a suit in equity where it appeared that the defendant, as practically sole owner of the stock in a corporation carrying on a dry goods business, sold certain of the shares to the complainant, and the latter, who was an experienced merchant, entered the business and after about eight months the parties entered into another contract pursuant to which the complainant made a further purchase of stock which was to be paid for in instalments, and, after having made a number of payments under the second contract, the complainant discovered that the defendant had concealed the fact that he was indebted to the corporation in a large sum, and complainant prayed that the collection of the notes be enjoined and the notes be delivered up for cancellation, but failed to offer to return the stock, and defendant filed a cross-bill alleging that the consideration for the second purchase was payment for the stock and also the release of his indebtedness, *held* that the action of the chancellor in dismissing both bills for want of equity was proper.

3. EQUITY, § 254*—*when amendment to bill properly refused.* An amendment to a bill offered after the expiration of more than a year from the filing of the answer, and eight months after a reference to the master to report the testimony, and over a month after the case had been heard by the court and taken under advisement, and where the proposed amendment tendered new and different issues from those which had been tried and were about to be determined, *held* properly refused.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. CANCELLATION OF INSTRUMENTS, § 26*—*when relief denied on bill and cross-bill because of laches.* In a suit in equity where the complainant in the original bill sought relief from a contract for the purchase of stock, on the ground of fraudulent concealment of a debt which the defendant owed to the corporation, and the defendant in the original bill sought by cross-bill to enforce an alleged agreement for the release of such debt, *held* that both parties were negligent and had slept on their rights, and neither was entitled to relief.

Etha J. Calhoun, Appellee, v. Central Illinois Light Company, Appellant.

Gen. No. 6,389. (Not to be reported in full.)

Appeal from the Circuit Court of Peoria county; the Hon. CLYDE E. STONE, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 19, 1917.

Statement of the Case.

Action by Etha J. Calhoun, plaintiff, against Central Illinois Light Company, defendant, to recover damages for personal injuries received through the explosion of a hot water heater in the basement of a building in which plaintiff was janitress, which boiler defendant was endeavoring to sell to the owner of the building. From a judgment for plaintiff for eight hundred dollars, defendant appeals.

QUINN & QUINN, for appellant; FRANK J. QUINN and HAROLD R. SCHRADZKI, of counsel.

KIRK & SHURTLEFF, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Abstract of the Decision.

1. NEGLIGENCE, § 188*—*when evidence sufficient to show lack of knowledge of danger of explosion from hot water boiler by janitress.* In an action by a janitress against her employer for damages for personal injuries received through an explosion in a hot water boiler which she was operating, where it appeared that the plaintiff knew of some defect in the heater, but did not know of the danger, *held* that the jury were warranted in finding that plaintiff did not know and was not charged with knowledge of the danger from whatever defect of the heater she knew of.

2. APPEAL AND ERROR, § 1321*—*when presumed that jury found that accident occurred as claimed by plaintiff.* In an action by a janitress against the owner of a hot water heater for personal injuries received through an explosion of the heater in the building in which plaintiff was employed, where it appeared that the plaintiff had looked after the heater for some time, and knew that the pilot light had theretofore sucked out when a faucet was quickly closed, and, at the time of the accident plaintiff was waiting to turn off the gas if the light should again suck out while a party whom she had let upstairs was using the hot water, and plaintiff claimed that the explosion was caused by the negligence of the defendant in not cleaning the chimney, etc., and the defense was that the explosion was caused by plaintiff's negligent act in failing to light the pilot until after a faucet had been opened by the party whom she had let upstairs, *held* that it must be assumed that the jury found that the accident occurred as claimed by the plaintiff.

3. NEGLIGENCE, § 17*—*when duty lies upon owner to put in repair heater which he is attempting to sell to owner of building.* In an action by a janitress against her employer for personal injuries received through an explosion in a hot water heater contained in a building, where the defendant was the owner of the heater and had notice of its defective condition and defendant claimed that it was endeavoring to sell the heater to the owner of the building as a secondhand article, and that therefore the transaction was a bailment for the mutual benefit of the defendant and the owner, and there was no implied warranty that the heater was fit to use, and no duty rested on the defendant to put it in order, *held* that as the defendant was undertaking to sell the heater and as demonstrations were being made, and the defendant had notice of defects in the heater, and also knew that plaintiff would operate the heater, it was the duty of the defendant to put the same in order.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

James Sloan and Cora Sloan Clausen, Appellees, v. John F. Sloan, Frederick J. Sloan, Daniel E. Horan, Mary A. Cole and Alex McDonnell, Appellants.

Gen. No. 6,392.

1. **DEEDS, § 1***—*when contract for conveying land to trustee constitutes conveyance and not trust and is invalid because not signed by grantees.* On a bill by a grantor to set aside and cancel an agreement whereby such grantor turned over his property to his children, and which provided that a trustee should hold the property for the beneficiaries, pay the income to the grantor during his lifetime and at the death of the grantor divide such property as directed, and where several of the children sought to have the agreement upheld, and one, after having been made a defendant, joined as party complainant, instrument construed and *held* to have been a conveyance of the property by the grantor to his children with an undertaking on their part, and that as such children did not sign the writing they could not be held bound by its provisions without their consent, and that the finding of the chancellor awarding a return of the property to the complainant should be sustained.

2. **CONTRACTS, § 164***—*how construed.* A contract should be construed in the light of the surrounding circumstances, but if it is plain and unambiguous the court has no power to write into it something which the scrivener omitted.

Appeal from the Circuit Court of Peoria county; the Hon. CLYDE E. STONE, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 19, 1917.

EVANS & EVANS, for appellants.

JUDSON STARR and SCHOLES & PRATT, for appellees.

MR. JUSTICE CARNES delivered the opinion of the court.

James Sloan, a retired farmer about seventy-eight years old, residing in Peoria, Illinois, with property

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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consisting of promissory notes and securities aggregating about \$18,000, while sick at a hospital January 8, 1913, executed what purported to be his will disposing of all his property, giving it for the most part to his five children in equal shares. . Some days afterwards when he had partially recovered from his sickness, he declared that he did not know anything about making the will, and that it was not such a disposition of his property as he desired. Afterwards he expressed a desire to put his property in such a way that the making of such a will as he had been caused to sign while sick could not again occur; that he wished to make a new will and dispose of his estate so that the disposition could not thereafter be changed. His son, Dr. John F. Sloan, at his request consulted a lawyer in Peoria with reference to the matter and was advised that an irrevocable will could not be made, but that an irrevocable disposition of the property could be accomplished by transferring the estate to a trustee. This information was conveyed to James Sloan, and he suggested Daniel E. Horan to act as trustee. Horan was called by telephone and consented to so act. A meeting was arranged at the attorney's office, and James Sloan went to his box at the bank and got his notes and securities and took them there, and informed the attorney that he intended at his death that \$7,000 should go to John F. Sloan, \$7,000 to Frederick Sloan, \$3,500 to Cora Sloan Clausen, three of his children, and \$500 to Mary A. Cole, a woman with whom he had boarded. He discussed the matter with the attorney and was told that he could make an absolute transfer of his property that could not be revoked, and that would secure the income therefrom to him during his lifetime. He directed the attorney to draw such an instrument, and he did draw in duplicate the instrument hereinafter set out, and James Sloan, Daniel E. Horan and Dr. John F. Sloan went to the

law office that afternoon, January 28, 1913, and James Sloan examined the instrument and had it read aloud and explained to him, and announced it was satisfactory, and signed both copies, and indorsed the notes therein described and handed them to Horan, with one copy of the instrument so executed. The instrument, signatures and acceptance by Horan read as follows:

“Know All Men By These Presents, that I, James Sloan, of the City of Peoria, in the County of Peoria, and State of Illinois, party of the first part, for and in consideration of the sum of One (\$1.00) Dollar to me in hand paid, and other good and valuable considerations, the receipt of all of which is hereby acknowledged, have granted, bargained, sold and delivered, and do hereby grant, sell, bargain and deliver unto John F. Sloan, of Peoria, Illinois, Frederick J. Sloan, of Galesburg, Illinois, and Cora A. Clausen, of Omaha, Neb., my sons and daughter, respectively, parties of the second part, the following property:

(Describing securities.)

“To Have and To Hold the said property unto the said parties of the second part, their heirs, executors, administrators and assigns, to and for their own proper use and behoof forever, in the manner herein-after provided.

“And I do hereby assign, transfer and deliver unto said parties of the second part, all of the notes and other evidences of indebtedness as above set forth, together with all the interest and other sums due or to become due thereon, and I do hereby assign, transfer and deliver unto said parties of the second part, all of my right, title and interest in and to any and all Trust Deeds, Mortgages and other securities executed in my favor or for my benefit to secure the payment of said sums of money respectively. Meaning and intending hereby to transfer and deliver absolutely to the parties of the second part, all of my right, title and interest of every kind and character in and to the above described property.

“It is expressly understood and agreed however,

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that in consideration of the foregoing transfer of the above described property to the parties of the second part, all of said property and all evidences thereof and all manner of securities therefor and all papers in connection therewith, shall be and are this day at the time of the execution of this agreement, transferred and delivered to Daniel E. Horan, of Peoria, Illinois, as Trustee and acting as agent of and for the parties of the second part for the following uses and purposes:

"First. It being understood and agreed and a consideration of this transfer that I shall receive the income from the above described property and any and all re-investments thereof during the term of my natural life, the said Daniel E. Horan, as Trustee, holding said property for the parties of the second part, shall collect all of the income, interest and other proceeds, if any, from said property from time to time, when due and deliver the same to the party of the first part for his support and maintenance.

"Second. The said Daniel E. Horan, as Trustee, shall collect the principal of said sums of money respectively and the notes evidencing the same, and shall re-invest the said sums of money, or the proceeds of said notes in such manner as he shall deem to the best interests of all parties concerned and in such manner as will produce a net income from time to time equal to that now derived therefrom, and he shall keep the principal of said sums of money intact and conserve the same for the parties of the second part.

"Third. At the death of the party of the first part, the said Daniel E. Horan, as such Trustee, shall, as soon as conveniently may be done, divide the said sums of money and the said property, among the parties of the second part in the following proportions; which are the proportions and interests respectively in said property hereby transferred and delivered to each of them, viz.: The said Cora A. Clausen, shall receive the sum of Four Thousand Dollars (\$4,000.00) in money or its equivalent, provided, however, that she shall forthwith, upon receipt thereof, pay out of

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said sum to Mary A. Cole, now residing at No. 706 Hancock Street, Peoria, Ill., the sum of Five Hundred Dollars (\$500.00); the balance of said money and property shall be divided and distributed by said Trustee in equal proportions to the said John F. Sloan and Frederick J. Sloan, share and share alike, each of my said sons thereby receiving, approximately, the sum of Seven Thousand Dollars (\$7,000.00).

"This agreement shall extend to and be binding upon the heirs, executors, administrators and assigns of all parties hereto. In case of the death or inability to act of the said Daniel E. Horan, as Trustee, I hereby appoint Alex McDonnell, of Peoria, Ill., to act as his successor as such trustee.

"In Witness Whereof, I have hereunto set my hand and seal this 28th day of January, A. D. 1913.

James Sloan (Seal)

"Witnesses:

"Daniel E. Horan.

"Jos. F. Bartley.

"Peoria, Ill., January 28, 1913.

"I do hereby accept the duties and obligations as Trustee and agent in accordance with the terms of the foregoing instrument.

Daniel E. Horan."

April 15, 1913, James Sloan filed his bill in equity praying that this contract be canceled and the property returned to him, making all the beneficiaries therein named parties defendant. Afterwards, the bill was dismissed as to Cora Sloan Clausen, defendant, and she joined as a complainant in an amended bill, leaving the two sons, Mary A. Cole and the trustee defendants.

The grounds on which relief was sought in the amended bill were: (1) That the execution of the instrument by the complainant was obtained by fraud and undue influence; (2) that he had not at the time sufficient mental capacity to execute and deliver it, and know and understand what he was doing; (3) that as

matter of law the instrument was a mere contractual one and did not become operative because of the failure of Cora Sloan Clausen to accept it or consent to be bound by its terms.

The defendants answered, denying the allegations of the bill upon which such claim for relief was based, and the cause was submitted to the master in chancery to take the proof and report his conclusions of law and fact. He did so, and found and reported adversely to the complainant on claims numbered 1 and 2, and in his favor on number 3. It appeared without question that Cora Sloan Clausen had, when she first learned of the contract, refused to accept it or be bound by it. Each party filed exceptions to that part of the report adverse to them. The chancellor overruled all exceptions and entered a decree that the property should be returned to the complainant, James Sloan, from which decree the defendants prosecute this appeal. By errors and cross-errors assigned here, the three questions presented by the bill, as before noted, are submitted for review, but the controlling one is whether the master and the court erred, as appellants state it: "In construing the instrument to involve covenants and obligations to be kept and performed by the children of James Sloan, *cestuis que trust*." If it did amount to a contract on the part of those children binding them to do and perform certain things for the benefit of the grantor, there can be no question that the grantor could revoke the contract before its acceptance by the grantees. In such case it amounted only to an offer to his three children that they should have certain property if they would comply with certain prescribed conditions, leaving them to accept or reject as they saw fit. As we have before noted, Cora Sloan Clausen refused to be bound by the contract as soon as she learned about it; therefore, if the writing is to be taken as a contract between James Sloan and

his children and Horan, the chancellor was right in his conclusion.

Appellants strongly insist that it should be read as simply creating a trust in Horan for the benefit of the beneficiaries named; that it imposes no burden on the beneficiaries, and therefore the refusal of one of them to accept the provision in her favor is not important, and cites many authorities in support of the rule that it is not necessary for beneficiaries in a trust agreement to all assent or accept the provision made for them; but appellants find it necessary to support their contention that the writing is a mere creation of trust for the benefit of the grantor's children by much reference to and discussion of what James Sloan said he wanted, and told the attorney he desired. It is true that the instrument should be construed in the light of the surrounding circumstances; but if it is plain and unambiguous, the court was without power in this proceeding to write into it something that the scrivener omitted. No question of reforming the written instrument is here presented.

We see no escape from the conclusion that the instrument was a conveyance of the property by James Sloan to his three children named, with an undertaking on their part that through Daniel E. Horan, as their agent and trustee, their father should, during his life, be paid an income from the property without impairing the principal, equal to what he was then receiving, and a separate undertaking on the part of Cora Sloan Clausen to pay Mary A. Cole \$500. These children did not sign the writing and cannot be held bound by its provisions without their consent. There being no question that Cora Sloan Clausen never consented to be so bound, but on the contrary refused to accept the provision in her favor, we are of the opinion that the chancellor did not err in accepting the

Brown v. Saathoff, 205 Ill. App. 194.

master's construction of the contract and entering a decree accordingly. The decree is affirmed.

Affirmed.

MR. PRESIDING JUSTICE NIEHAUS, having at one time been connected with the case as master in chancery, took no part.

Fred C. Brown et al., Appellees, v. Phoebe Saathoff et al., Appellees. Gertrude Brown Arrison, Appellant.

Gen. No. 6,393. (Not to be reported in full.)

Appeal from the Circuit Court of Livingston county; the Hon. GEORGE W. PATTON, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 19, 1917.

Statement of the Case.

Petition by Gertrude Brown Arrison to obtain a share of the proceeds of the partition sale of a farm and filed in the case of Fred C. Brown and others, complainants, against Phoebe Saathoff and others, defendants. From a judgment approving the report of the master in chancery who had sold the property, and holding petitioner guilty of laches, petitioner appeals.

BERT W. ADSIT and McILDUFF & THOMPSON, for appellant.

A. C. BALL and GUY L. LOUDERBACK, for appellees.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. **INFANTS, § 28***—*when infant guilty of laches in commencing suit after reaching majority.* In a suit in equity against a former master in chancery to recover the proportionate part of the proceeds of a partition sale to which the complainant was entitled, where it appeared that the complainant, who was a minor, fifteen years old, entered her appearance in the partition suit without service of process on her, and where her minority was not known, and in an amended bill complainant was stated to be of legal age, and the master in chancery paid over the proportionate part to which complainant was entitled to certain attorneys, who he assumed were authorized to appear for her, but whom the complainant claimed not to have employed, and where the proceeds were all distributed and the master, whose term had then expired, had not filed a report (the report having been filed after commencement of the instant suit), and complainant made no move in the matter until she was twenty-seven years of age, and there was no showing of any disability on her part since her majority, *held* that although the master should have filed his report and should have ascertained the authority of the attorneys to collect complainant's money, he acted in good faith and complainant was barred from recovery by laches.

2. **ATTORNEY AND CLIENT, § 52***—*when authority of attorneys to act presumed.* The authority of attorneys to act for the parties for whom they appear is presumed by the courts.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hockings v. Westmoreland, 205 Ill. App. 196.

**Frank Hockings, Appellee, v. Thomas Westmoreland,
Appellant.**

Gen. No. 6,394. (Not to be reported in full.)

Appeal from the Circuit Court of Grundy county; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded. Opinion filed April 19, 1917.

Statement of the Case.

Action in assumpsit by Frank Hockings, plaintiff, against Thomas Westmoreland, defendant. From an order overruling a motion to set aside a judgment obtained by default, defendant appeals.

J. W. RAUSCH, for appellant.

F. H. HAYES, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1802*—*when case reversed and remanded.* In an action where a default judgment was entered, a motion to vacate the judgment was denied and the prayer for appeal was in general terms, and on appeal it was contended that there was not sufficient evidence in the record to sustain the judgment, and it appeared questionable whether the plaintiff was entitled to a judgment for any amount as damages, and a certain amount was included for taxes without any showing why the defendant should be liable therefor and interest was allowed without any contract to pay interest or any other fact entitling the plaintiff to interest being shown, *held* that because of the inclusion of the item of interest the judgment should be reversed and the cause remanded.

2. JUDGMENT, § 124*—*what is effect of default.* As a general rule a default admits the cause of action and the material traversable allegations of the declaration, although not the amount of damages, and hence the amount to be recovered is all plaintiff is required to prove or the defendant is permitted to controvert.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hoffman v. Chicago & Northwestern Ry. Co., 205 Ill. App. 197.

John A. Hoffman, Appellee, v. Chicago & Northwestern Railway Company, Appellant.

Gen. No. '6,397. (Not to be reported in full.)

Appeal from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded. Opinion filed April 19, 1917.

Statement of the Case.

Action by John A. Hoffman, plaintiff, against the Chicago & Northwestern Railway Company, defendant, to recover damages for the overflowing of plaintiff's land caused by the obstruction of the flow of water in a stream by the construction of a high embankment. From a judgment for plaintiff for six hundred dollars, defendant appeals.

STEVENS, MILLER & ELLIOTT, for appellant.

SHEEN & GALBRAITH, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. RAILROADS, § 348*—*when exclusion of evidence as to basis of assessment of damages for overflow of land in prior action is erroneous.* In an action against a railroad for damages to land caused by the construction of a solid embankment about two hundred feet from such land, and adjacent to a solid embankment erected by another railroad, thus leaving no outlet for a natural water course which, before such construction, ran across the defendant's right of way, and causing the water to back up and overflow the plaintiff's land, where it appeared that in a prior action damages had been assessed to the plaintiff and the plaintiff claimed that the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hoffman v. Chicago & Northwestern Ry. Co., 205 Ill. App. 197.

judgment in the former action was *res judicata*, and the offer of the defendant to prove that the damages in the former action were not in fact assessed on the theory of law that the defendant was liable for the entire damage, and that in fact it was not liable for the entire damage was denied, *held* that the refusal to permit the introduction of the evidence offered was error.

2. RAILROADS, § 348*—*when exclusion of evidence in action for damages for overflow due to construction of embankment is erroneous.* In an action against a railroad for damages to land caused by the construction of a solid embankment about two hundred feet from such land, and adjacent to a solid embankment erected by another railroad, thus leaving no outlet for a natural water course which, before such construction, ran across the defendant's right of way, and caused the water to back up and overflow the plaintiff's land, where the defendant offered to prove that its embankment did not change conditions which had existed long prior to the building of such embankment, and also offered to prove that the plaintiff had assisted in the work of closing the water course, and made various other offers to prove that it should not be liable for the entire damage, and all the offers were refused, *held* that the exclusion of such evidence was error.

3. RAILROADS, § 348*—*when evidence that embankment constructed by another railroad obstructed passage of water from land of adjoining owner is admissible.* In an action against a railroad for damages to land caused by the construction of a solid embankment about two hundred feet from such land and adjacent to a solid embankment erected by another railroad, thus leaving no outlet for a water course, and causing the water to back upon and overflow the plaintiff's land, *held* that the defendant had the right to show that the embankment of the other railroad had obstructed the passage of such water from the plaintiff's land at the time the defendant constructed its embankment.

4. JUDGMENT, § 40*—*when doctrine of res judicata applies.* The doctrine of *res judicata* does not apply unless it appears that the parties, the subject-matter and the cause of action are identical.

5. WATERS AND WATER COURSES, § 15*—*what is liability of wrongdoer overflowing land for wrongful acts of others.* In actions for damages to land by causing water to back upon and overflow such lands, the wrongdoer does not become responsible for the wrongful acts affecting the land committed independently by others.

6. ESTOPPEL, § 16*—*when doctrine of estoppel by verdict is applicable.* The doctrine of estoppel by verdict is but another branch of the doctrine of *res judicata*, and is applicable when some

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section numbers.

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controlling fact or matter material to the determination of both causes has been adjudicated in a former proceeding and the same fact or matter is again at issue between the same parties.

7. EVIDENCE, § 323*—*when parol evidence is admissible to show testimony given and questions determined.* Where a judgment is offered in evidence in bar of a claim, and it is uncertain from the record what was adjudged, parol evidence is admissible to show what testimony was given and what questions were submitted for determination at the time the judgment was entered.

John McNeill, Appellee, v, Sarah Allen, Appellant.

Gen. No. 6,406.

1. BOUNDARIES, § 31*—*when statute relating to surveys is inapplicable.* In an action to establish a permanent survey, under the Act of 1901 providing for such surveys (J. & A. ¶ 11143 *et seq.*), where there was a dispute as to boundaries, and the defendant claimed that the act related only to disputes as to corners, *held* that the statute was applicable in cases of disputes as to boundaries.

2. BOUNDARIES, § 44*—*when court has jurisdiction to assess costs.* In an action to establish a survey under the Act of 1901 providing for such surveys (J. & A. ¶ 11143 *et seq.*), where the defendant failed to appear until after the making of the report by the commissioners, and then filed a writing setting up that the line found by the commissioners took about two acres of her land, and prayed for a hearing on such objections, and the writing was stricken from the files, the report approved and costs assessed equally between the parties, and the defendant objected to the assessment of costs against her, *held* that the petition contained averments which gave the court jurisdiction, that there was due service on the defendant and that she did not deny the averments but only presented an issue as to ownership, and that therefore the costs were properly assessed.

3. APPEAL AND ERROR, § 1265*—*when presumed that Supreme Court would have taken jurisdiction of appeal.* In a proceeding under the Act of 1901 providing for the permanent survey of lands (J. & A. ¶ 11143 *et seq.*), where the defendant argued the case on the theory that the title to real estate was involved in the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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proceeding, and it appeared that an appeal had been prosecuted to the Supreme Court, where the cause was transferred to the Appellate Court, *held* that it was to be assumed that if such contention had been correct the Supreme Court would have taken jurisdiction of the appeal.

4. BOUNDARIES, § 34*—*what cannot be determined in proceedings for establishment of boundaries.* In proceedings under the Act of 1901 providing for the permanent survey of land (J. & A. ¶ 11143 *et seq.*), where the defendant by objections in writing to the commissioners' report sought only to present an issue as to the title to a certain strip which she claimed the proceedings might deprive her of, and where the objections were stricken from the files and the report approved, *held* that although an issue might have been presented by objections to the report which would have entitled the defendant to a jury trial, the issue presented was not one which could have been determined in the proceedings in question.

5. BOUNDARIES, § 32*—*what are powers of commissioners in proceedings to establish.* In proceedings under the Act of 1901 (J. & A. ¶ 11143 *et seq.*), providing for the permanent survey of lands, where one of the parties sought to have the title established to a strip which she claimed the proceeding might deprive her of, *held* that the proceedings were not to establish the title of the parties to any portion of the property as to which a boundary line was to be restored, and that the commissioners had no power to establish new corners or run new boundary lines, but simply to re-establish those once established by the United States.

Appeal from the Circuit Court of Whiteside county; the Hon. FRANK D. RAMSAY, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 19, 1917.

A. A. WOLFERSPERGER, for appellant.

HENRY C. WARD, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

This is a proceeding under the Act of 1901 and amendments, providing for the permanent survey of lands (J. & A. ch. 133, ¶ 11143 *et seq.*). The act is a re-enactment of the law of 1869 except as to amend-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

ments of section 2 in 1911, which do not affect any question here involved.

Appellee, John McNeil, filed a petition under that statute in the Circuit Court averring that he owned farm lands, particularly described, adjoining lands of Sarah Allen, the appellant, with common corners and common boundaries between them, with other appropriate averments to bring the case within the statute, and asked for a permanent survey in accordance with its provisions. In due time the petitioner appeared. Sarah Allen did not appear. The court appointed a commission, which made a report not shown by the abstract. Appellant then appeared and filed a writing in which she set up that the line found by the commission was some distance over on her land from one that had been established by agreement in 1868 and acquiesced in ever since that time; that she would lose about two acres of land, and asked that the cause be set for hearing upon the facts so that she might be able to present her evidence to sustain her objections to the report. The court on motion of appellee struck said writing from the files, and entered a final order approving and confirming the commissioner's report and directing that the expense account of said commissioners, and the costs of the court, and recording of the plat and report be equally divided and equally charged against the petitioner and said Sarah Allen. She obtained orders for and prosecuted an appeal to the Supreme Court, where the cause was transferred to this court.

Appellant argues her case on the theory that title to the strip of land is involved in this proceeding. If she was right in that view of the case we assume the Supreme Court would have taken jurisdiction on her appeal. Its action in transferring the case is an answer to any suggestion that a question of title is involved. It may be said on the authority of *Townsend*

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v. Radcliffe, 63 Ill. 9; *Huston v. Atkins*, 74 Ill. 474; *Atkins v. Huston*, 106 Ill. 492; and *Hood v. Tharp*, 228 Ill. 244, that an issue might be presented by objections to the commissioners' report that would entitle any party interested to a jury trial; but the issue sought to be presented by appellant was simply and only that she had acquired title to a strip of land by adverse possession of which this proceeding might deprive her. It was held in *Krause v. Nolte*, 217 Ill. 298, that the statute does not confer power on the commissioners to establish new corners or run new boundary lines, but simply to re-establish those once established by the United States; that the proceeding is not one to establish title of the parties to any portion of the property as to which a boundary line has to be restored. The court said "Establishing title is an entirely different matter from re-establishing and restoring lost corners or disputed boundaries." The same was held, in substance, in *Schrader v. Kehr*, 234 Ill. 205, where the court said that after the lost corners and boundaries have been located the rights of the parties to the lands in controversy must be determined in a proceeding at law for that purpose, citing and discussing earlier Illinois cases. *Rich v. Naffziger*, 248 Ill. 455, follows the doctrine of the two last cited cases. The court said the line run by the commission of surveys must be accepted as the true line in determining the record title, but there still remained the question whether the assertion of the legal title by the owner was barred by adverse possession; that although the defendants (in a trespass case) did not have the record title to the land in question, they might show that they had acquired title by virtue of the statute of limitations. The authorities are reviewed and discussed in *Burns v. Kimber*, 176 Ill. App. 515. It follows that the trial court did not err in striking from the files a pleading presenting only an issue that could not be determined in that proceeding.

Appellant suggests that the petition did not show that the dispute between the parties related to governmental corners or boundaries; that there is in fact no dispute as to the government corners, and that the statute expressly states that there must be a dispute and that appellant refused to enter into "an agreement to locate such corners." The statute is not limited to disputes as to corners. Section 2 of the Act is a provision for cases where "corners and *boundaries* are in dispute," or where it is desired to have "corners and *boundaries* permanently established." It sufficiently appeared by the petition, and certainly appears on the record here, that there was a dispute as to the "boundaries."

Appellant complains that the court assessed her one-half of the costs of the proceeding, and says that it is true the statute provides "the expenses and costs of the surveys and suits shall be apportioned among all the parties according to their respective interests" but that the statute should not be applied because the whole proceeding is based on an entirely different proposition than the act calls for, and there is no evidence in the case showing that appellant refused to enter into an agreement to have a commission appointed, and no evidence in the case that there is a dispute as to the division line; therefore she should not be assessed one-half the costs. The petition, which was sworn to, contained averments which, if true, gave the court jurisdiction. There was due service on appellant. She did not deny those averments but only presented an issue on the ownership of the land. The court seems to have followed the statute in apportioning the costs and did not err in so doing. *Stevens v. Allman*, 68 Ill. 245. Finding no error in the record, the judgment is affirmed.

Affirmed.

**R. E. Gustin for use of Hiram H. Atwood, Appellee,
v. Eliza J. Bryden, Executrix, Appellant.**

Gen. No. 6,359.

1. **EXECUTORS AND ADMINISTRATORS, § 313***—*when award of execution improper*. An award of execution against an executor is improper.

2. **HUSBAND AND WIFE, § 4***—*when liable for burial expenses of wife*. The duty of the husband to support his wife and to furnish her with necessaries, etc., includes the duty to give her remains suitable burial after her death, and such duty is not set aside by section 4 of the Administration Act (J. & A. § 52), giving an executor, before probate of the will, authority to bury the deceased and pay necessary funeral expenses.

3. **HUSBAND AND WIFE, § 4***—*what is effect of Married Women's Acts on liability of husband for funeral expenses*. The common-law liability of a husband for the funeral expenses of his wife has not been abrogated by the Married Women's Acts.

4. **HUSBAND AND WIFE, § 4***—*what is effect of classification of claims against estate on liability of husband for funeral expenses of wife*. The common-law liability of a husband for the funeral expenses of his wife is not affected by the classification of claims against estates by which funeral expenses are provided to be paid as claims of the first class.

5. **HUSBAND AND WIFE, § 4***—*when husband relieved from liability for funeral expenses of wife*. Where a husband paid the funeral expenses of his wife and sought to enforce the claim against the estate of the wife, and it appeared that the wife had in her last will charged her estate with the payment of funeral expenses, *held* that the husband was thereby relieved from liability, regardless of his common-law liability.

6. **HUSBAND AND WIFE, § 4***—*what is effect of renouncement of husband under will on his liability for funeral expenses of wife*. Where a husband paid the funeral expenses of his wife and sought to enforce the claim against the estate of the wife, and had renounced under the will, *held* that by such renouncement the matter was placed in the same situation as if there had been no will, so as to render him liable for funeral expenses.

7. **APPEAL AND ERROR, § 1387***—*when excluded evidence treated by Appellate Court as if admitted*. Where the renunciation by a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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husband under the wife's will was excluded by the trial court, on the trial of a claim of the husband against the estate for funeral expenses; and where it appeared that but for such renunciation the husband would, by the terms of the will have been relieved from his common-law liability to pay such expenses, and that the execution and filing of the renunciation was proven, and it was offered in evidence and was contained in the bill of exceptions, *held* that if it was competent evidence it should be treated by the Appellate Court as if it had been admitted.

8. HUSBAND AND WIFE, § 4*—*when husband taking assignment of claim for funeral expenses paid undertaker is not in position of undertaker.* Where a husband paid the funeral expenses of his wife and obtained an assignment from the undertaker, and then sought to enforce the claim against the estate of the wife, and by the terms of the last will of the wife she charged her estate with the payment of such expenses, but the husband renounced under the will, *held* that even if the estate had paid the claim to the undertaker it could have deducted the amount from the moneys going to the husband from his wife's estate, on the ground of his primary liability, and that therefore he could not, by paying the bill and taking an assignment, put himself in the position of the undertaker.

9. APPEAL AND ERROR, § 1803*—*when case not reversed and remanded for new trial because of erroneous exclusion of evidence.* Where the renunciation by a husband under the wife's will was excluded by the trial court, on the trial of a claim of the husband against the estate of the wife for funeral expenses, and where it appeared that but for such renunciation the husband would by the terms of the will have been relieved from his common-law liability to pay such expense, and that the execution and filing of the renunciation was proven and it was offered in evidence, but that its admission was refused, and it was contained in the bill of exceptions, *held* that, as it was competent evidence and should have been admitted, there should not be a reversal and remanding of the cause for a new trial merely to let in such renunciation, but that it should be treated as if it had been admitted by the trial court.

Appeal from the Circuit Court of Winnebago county; the Hon. ARTHUR H. FROST, Judge, presiding. Heard in this court at the October term, 1916. Reversed with finding of facts. Opinion filed April 19, 1917.

GEORGE P. GALLAHER and E. D. REYNOLDS, for appellant.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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LAWBAUGH & LARGE and B. JAY KNIGHT, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Mrs. Delia A. Atwood died testate on August 21, 1913. Her funeral was held on August 24, 1913. R. E. Gustin, an undertaker, furnished the casket, hearse, carriages, etc., and conducted the funeral and the burial. His bill therefor was \$226. Hiram H. Atwood, husband of the deceased, paid the bill by his check on that day or the next. On November 10, 1913, a claim for said funeral expenses was filed in the County Court in the name of Gustin against the estate of Delia A. Atwood, deceased, except that the amount was stated at \$233. On September 19, 1914, an assignment of said claim by Gustin to Atwood was filed in said County Court. Said assignment was dated August 25, 1913. On April 13, 1915, said claim of Gustin was disallowed by the County Court. Up to that time the record of the County Court, as now before us, contained no reference to the name of Hiram H. Atwood as a claimant, except in the assignment so filed. Gustin did not appeal from said judgment, but Atwood did appeal to the Circuit Court. In the Circuit Court said case was entitled "R. E. Gustin for the use of Hiram H. Atwood vs. The Estate of Delia A. Atwood." There was a jury trial and a verdict for claimant for \$226. A motion by defendant for a new trial was denied, and Gustin, for the use of Atwood, had a judgment for \$226 and costs, with an award of execution therefor. Thereafter the title of the cause was so amended as to make the name of the defendant "Eliza J. Bryden, executrix of the last will and testament of Delia A. Atwood, deceased." The order for an execution was erroneous. *Burnap v. Dennis*, 4 Ill. (3 Scam.) 478; *Dye v. Noel*, 85 Ill. 290; *Johnson v. Devine*, 192 Ill. App. 453.

Appellee concedes that at common law the husband was liable for his wife's funeral expenses, but contends that: (1) By virtue of the Married Women's Acts the common law on that subject is abrogated and the estate of the wife is primarily liable for her funeral expenses, and if the husband has paid those expenses he may recover from his wife's estate therefor; (2) that the provisions of the Administration Act, which make estates of deceased persons liable for their funeral expenses, make the estate of a deceased wife primarily liable therefor; (3) that because of the provision of the will of deceased, her estate is ultimately liable for said funeral expenses, and her husband can recover against her estate therefor; (4) that regardless of the statutes and the will, a husband is entitled to be reimbursed from his deceased wife's estate for her funeral expenses paid by him; (5) that the undertaker had a valid claim against the estate of deceased, and the husband, as his assignee, has the rights of the undertaker, and therefore has a valid claim, independent of all other considerations.

Most of the contentions of the parties to this suit are stated and leading authorities cited in 13 R. C. L., article "Husband and Wife," sections 230, 247 and 248, and in 21 Cyc. 1449, and notes.

Cunningham v. Reardon, 98 Mass. 538, is based upon the proposition that the husband is liable not only for the necessary support of his wife, but also for her funeral expenses. Afterwards in *Constantinides v. Walsh*, 146 Mass. 281, it was held that under statutes making the funeral expenses of a deceased person a preferred charge upon the estate of such deceased, and under statutes establishing the independent position of married women with regard to their property, the liability of the wife's estate is primary as between her estate and her husband, and that whether or not it was the husband's legal duty to see that his wife was buried he was entitled to recover against her estate

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his reasonable expenditures in that behalf; that if it was his legal duty to bury her, still her estate was primarily liable under the statutes referred to, and if it was not his legal duty, still a stranger could have recovered against her estate therefor; and that in paying such funeral expenses it was not to be presumed that the husband waived his legal rights and made a gift to the estate of his wife, in the absence of any evidence to that effect. This was followed without discussion in *Morrissey v. Mulhern*, 168 Mass. 412. In *McCue v. Garvey*, 14 Hun (21 N. Y.) 562, it was held that the funeral expenses of a dead person were primarily chargeable to that person's estate; that though the husband was bound to bury his deceased wife, and was probably liable for the expenses of burial, still the estate of the deceased wife was finally liable therefor. In *Freeman v. Coit*, 27 Hun (34 N. Y.) 447, it was held that in that State, where the expenditures for the burial of the wife had been made by the husband, and the wife left a separate estate, the husband was entitled to be reimbursed therefor from such estate. In *Pache v. Oppenheim*, 93 N. Y. App. Div. 221, the common-law obligation of the husband to bury his wife was sustained, but it was held that under the authorities in that State the estate left by the wife is primarily liable therefor, and the husband who has paid such reasonable expenses may recover from his wife's estate. In *McClellan v. Filson*, 44 Ohio St. 184, the common-law duty of the husband to bury his wife was recognized, but it was held that the common-law right and power of the husband over his wife's property had been almost entirely taken away by legislation (which legislation in Ohio was there stated, and is in many respects similar to our statutes relating to married women), and that as the reason for the rule which placed upon the husband the liability to pay his deceased wife's funeral expenses had largely disappeared, the court was willing to see the rule itself dis-

appear. In that case the executor had paid the funeral expenses and the husband had taken no part in employing the undertaker. The court disclaimed any purpose of deciding what was not before the court, and stated that what they did hold was that the executor had a right to pay these funeral expenses from the estate of the testatrix, and be allowed therefor in his accounts.

The following cases do not harmonize with the foregoing: In *Waesch's Estate*, 166 Pa. St. 204, it was held that the liability of the husband for his wife's funeral expenses, even though she has a separate estate, is too well settled to admit of argument; that the husband is primarily liable, and the wife's estate is liable only if the husband is insolvent, and that, if any balance remains for distribution, the funeral expenses which the husband should have paid should be deducted out of his distributive share. In *Galloway v. McPherson's Estate*, 67 Mich. 546, it was held that where there was no showing but that the husband was able to pay his wife's funeral expenses, it was his duty to do so, and the wife's estate was not liable; and *Sears v. Giddey*, 41 Mich. 590, supports that position. In *Gould v. Moulahan*, 53 N. J. Eq. 341, it was held that payment of the wife's funeral expenses devolved upon the husband, not by virtue of any interest he has in his wife's property, but from the personal advantage to him that his wife be suitably buried; that while there was a primary obligation on the husband to pay said expenses, there was a secondary obligation upon her estate, and the existence of the primary obligation did not discharge the secondary obligation, and that where, as in that case, the husband was financially unable to pay said expenses, the wife's estate is liable. In *Stonesifer v. Shriver*, 100 Md. 24, it was held that at common law the legal existence of the wife was merged in that of the husband, and he became entitled

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to all her personal estate, and as a consequence was bound to supply her with necessaries, and to bury her in a suitable manner; that statutes creating a wife's statutory estate do not absolve the husband from his common-law obligation to provide suitable burial for his wife, and that he is not entitled to any credit therefor in the settlement of his administration of her estate. In *Kenyon v. Brightwell*, 120 Ga. 606, it was held that at common law the husband was bound to bury his deceased wife and to defray her funeral expenses, and that this rule prevails generally in this country except in a few States which have prescribed a different rule by statute; that this duty to pay the wife's funeral expenses grows out of the husband's obligation to provide her with necessaries of life, and out of his authority to direct where she shall be buried; that statutes creating separate estates of married women, while they deprive the husband of rights at common law, do not absolve him from his duties at common law; that this common-law duty of the husband did not depend solely on the principle that marriage was a gift to the husband of the wife's estate, but that it was an obligation on the husband to whom the wife brought no portion as well as on him who received a fortune; that it was a consequence of the merger of the legal existence of the wife in that of the husband. A statute of that State required the husband to support and maintain his wife, and it was held this included the duty of burying her upon her death. In *Smyley v. Reese*, 53 Ala. 89, the husband was administrator of his deceased wife's estate, and claimed credit for the funeral expenses paid by him. Credit was refused. It was held that the statutes creating separate estates of married women did not absolve him from the duties the common law imposed; that it was his duty to provide her with necessaries, and that this duty was not solely dependent upon the common-

law rule that marriage was a gift to the husband of the wife's estate; that it was a consequence of the merger of the legal existence of the wife in that of her husband; that the wife was subject to and dependent on her husband, and that from that subjection and dependence arose a duty to maintain her, and that if she had a separate estate she was not compelled to pay for her necessities therefrom, and the husband is not not thereby relieved from liability for such necessities; that these necessities include her reasonable funeral expenses which the husband is bound to pay, and, if he does not provide them, the person volunteering to pay them for her can recover the amount from him; that the husband has an indisputable and paramount right to dispose of the body of his deceased wife by decent burial in a suitable place, and has no equity in his wife's estate for such funeral expenses; that when the husband paid the funeral expenses of his wife he paid his own debt only and that he was not entitled to credit therefor in settlement of administration. In *Bowen v. Daugherty*, 168 N. C. 242, it was held that at common law the husband is liable for his wife's funeral expenses, and that generally the estate of the wife is not liable, except where such claim is enforced on equitable principles, where the husband is insolvent. A statute in North Carolina authorized the wife to contract as if unmarried, with certain exceptions. It was held that her funeral expenses were an indebtedness of the husband, and there was no reason under the statute why that debt should be imputed to the wife, although if the husband was insolvent, and payment from him could not be enforced, an equity might arise in favor of the creditor to collect from the wife's estate; but that except under such conditions the debt was that of the husband and enforceable against his estate. In that case the wife did not leave sufficient personal estate to pay her funeral expenses

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and other debts, but did leave sufficient real estate to pay them, and the real estate of the wife was held not liable unless the husband was insolvent. Two opinions were filed, but both to the same effect. In *Carpenter v. Hazelrigg*, 103 Ky. 538, it was said that while the husband is bound in law to pay the funeral expenses of his wife, yet, if he fails to pay, her estate is liable. But it was held that, if the land she had devised to others was sold to pay these funeral expenses, her husband could be compelled to reimburse those to whom her estate passed. *Brand's Ex'r v. Brand*, 109 Ky. 721, was an action by the husband to reach one-half of his deceased wife's personal and one-third of her real estate. The executor, answering, set up that he had paid out of her estate the expenses of her last sickness and her funeral expenses, and that they should be retained by him out of whatever was otherwise payable to the husband. The statute provided that a husband should not be liable for his wife's debts beyond the value of the property he received from her by virtue of the marriage, but that he should be liable for necessities furnished after marriage. It was held that the executor was entitled to retain, out of the funds coming to the husband from the estate, the amount paid for the necessary expenses of the wife's illness and burial. This was so held notwithstanding that the will of deceased, a certified copy of which has been exhibited to us, appropriated \$1,000 for her funeral expenses and a monument over her grave. In the case entitled *In re Weringer's Estate*, 100 Cal. 345, it was held that at common law the husband was bound to bury his deceased wife and defray the necessary funeral expenses, and that this duty is involved in his obligation to maintain her while living, and that he has control of the body of his deceased wife, and must care for the same and select a proper place for interment, regardless of the wishes of her relatives. A like prin-

ciple was applied in *Mease v. Wagner*, 1 McCord (S. C.) 247.

Section 70 of our Administration Act (J. & A. ¶ 119) provides that all demands against the estate of any testator or intestate shall be divided into classes in the manner there prescribed, and the first class includes funeral expenses. It is contended that by virtue of this statute the estate of the wife becomes liable and the husband is exonerated. In *McClellan v. Filson*, *supra* (Ohio), the decision was in part based upon a statute which provided the order in which debts of a deceased should be paid, first among which were the funeral expenses. The same is true of the decision in *Constantinides v. Walsh*, *supra* (Mass). In *Buxton v. Barrett*, 14 R. I. 40, where the question was whether the funeral expenses of the wife should be charged against her estate or charged to the husband only, the court held they were properly chargeable against her estate, under a statute which provided that the estate of every deceased person should be chargeable with the funeral expenses of such deceased; and the court held that this included married women, and that whether the husband was also liable was not material. In the case entitled *In re Johnson*, 15 R. I. 438, there had been a judgment against a husband for his deceased wife's funeral expenses, but the husband was insolvent and the judgment was not satisfied, and there was an action by the administrator to sell the interest of the wife in certain real estate to pay those funeral expenses, and it was held that her estate was liable for those funeral expenses notwithstanding she left a husband, and that her liability had not been extinguished by an unpaid judgment against her husband. In *Moulton v. Smith*, 16 R. I. 126, the husband paid the funeral expenses and the suit was to reach the deceased wife's personal estate in favor of the administrator of the husband's estate, the husband having subsequently

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died, to recover said funeral expenses. It was held that the funeral expenses should be paid out of the wife's estate because of the statute which made the estate of every deceased person chargeable with the funeral expenses so far as the estate was sufficient therefor. In *Schneider v. Breier's Estate*, 129 Wis. 446, which was a claim by the husband against his wife's estate for her funeral expenses paid by him, the court cited the statute which provided the order in which the debts of deceased persons should be paid, the first of which was the necessary funeral expenses, and held that thereby the Legislature intended to include the estates of married women who left separate property, and that under this statute the estate of the wife was primarily liable for these expenses, and that the claim would be enforced against the wife's estate without regard to the liability of the husband. On the other hands, in *Kenyon v. Brightwell*, *supra* (Ga.), where the question was as to the liability of the husband to defray his deceased's funeral expenses, the statute provided the order in which the debts of a decedent should be paid, and the second item was funeral expense, and it was claimed that by this statute the common-law rule had been abrogated, and the estate of every decedent is liable for funeral expenses. It was held that this statute merely provided the priority to be observed in the payment of debts of a decedent, and that unless expressly made so by statute or by the provisions of the wife's will, funeral expenses of a wife who leaves a husband surviving are not a debt of her estate. Another statute in that State bound the husband to support and maintain his wife, and it was held that this included the duty of burying her upon her death. In *Bowen v. Daugherty*, *supra* (N. C.), a statute provided the order in which claims should be paid in the administration of estates, and put funeral expenses in a certain class. It was held that this was only designed to recognize priori-

ties among the creditors, and to establish the order of payment between claimants who had valid debts against the estate and was not intended to create a liability which did not otherwise exist.

Similar questions have been discussed by our Supreme Court. In *Rea v. Durkee*, 25 Ill. 503, in an action against a husband for goods furnished his wife when she was living separate from him, it was held that the law imposed the duty upon a husband of furnishing the wife with all articles necessary and suitable to his degree and condition in life; or, as said in another place, all the necessaries suitable to his position in society and his means. In *Martin v. Robson*, 65 Ill. 129, which was after the passage of the Married Women's Acts of 1861 and 1869, it was held that since the husband no longer receives the wife's estate he is not liable for her torts. The effect of those acts is there discussed at length. But it is there said that certain duties and obligations still exist, and after stating what obligations the wife still has to her husband, it is further said that the husband is still bound to protect and maintain his wife, and that these duties and obligations upon husband and wife are not the result of the arrangement of their property at common law, but of the contract of marriage and the relation thereby created. It is there said that by the marriage she became one of his family, and he was bound to provide her a home and necessaries from a principle of duty and justice, and that the duties of the wife while cohabiting with her husband form the consideration of his liability for these necessaries. In *Douglas v. Gausman*, 68 Ill. 170, in discussing the effect of the Married Women's Acts, it is said that that law has greatly enlarged the rights of married women, but has not, perhaps with a few exceptions, relieved the husbands from any of their marital duties, and that he is still left to support his wife so long

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as she remains with him and discharges her duties. In *Bevier v. Galloway*, 71 Ill. 517, a suit by a physician against a husband for medical services rendered to a wife who had left her husband without his knowledge or consent and was living apart from him without just cause, and where for those reasons he was held not liable, it was again stated that the law requires the husband to maintain his wife and furnish her with all necessities suitable to his condition in life. In *Phelps v. Phelps*, 72 Ill. 545, the court speaks of the right of the wife to support during marriage. In *Hackett v. Smelsley*, 77 Ill. 109, which was a suit by a wife against certain persons for loss of her means of support by sale of liquor to her husband, thereby causing his intoxication, which cause of action arose after the Married Women's Acts referred to, it was said: "From the earliest period of the law there has been a legal obligation on the husband to support his wife. No act of the Legislature of this State, when this alleged cause of action accrued, had ever abrogated such law. It has never been annulled by judicial construction, nor do we recognize in courts the right so to annul it." And again: "A wife is being supported by her husband—is entitled to be so." And again: "This right of support is not limited to the supplying of the bare necessities of life, but embraces comforts, what is suitable to the wife's situation and the husband's condition in life." In *Mensing v. O'Hara*, 189 Ill. App. 48, it is held that a husband may maintain an action against an undertaker for an intentional mutilation of his deceased wife's remains, and that seems to be based upon his right to the possession and control of the dead body for the purpose of giving it burial. We understand that the duty of the husband to support his wife and to furnish her with necessities, etc., includes in that term the duty to give her remains suitable burial after her

death. Nor do we understand that this duty is set aside by the provisions of section 4 of the Administration Act (J. & A. ¶ 52), giving an executor, before probate of will, authority to bury the deceased and pay necessary funeral expenses. Although the decisions above cited in Illinois do not expressly refer to funeral expenses, we are of opinion that they indicate that in the view of our Supreme Court the enactment of the Married Women's Acts does not relieve the husband of the duty primarily cast upon him by the common law to give his wife's remains suitable burial, and that the views of our courts are in harmony with the general line of authority above cited from other States. Section 21 of the chapter entitled "Wills," in force July 1, 1827, Revised Laws of Illinois of 1833, begins as follows: "All demands against the estate of any testator or intestate shall be divided into classes in manner following, to-wit: 1st. All funeral and other expenses attending the last sickness shall compose the first class." Exactly the same provision is embodied in section 115 on the subject of "Wills" in the Revised Statutes of 1845. The same language in substance is contained in section 70 of the Administration Act of 1872, and is continued in said section as it has since been amended (J. & A. ¶ 119). It follows that this classification of claims against estates, by which funeral expenses are provided to be paid as claims of the first class, has been in force in this State at least ever since July 1, 1827, and was therefore in force long before the Married Women's Acts were adopted, and has been continued in force ever since without change. We are of opinion that the purpose should not be imputed to the Legislature to relieve the husband of his common-law liability to pay the funeral expenses of his deceased wife, by reason of this language, which has been continued in force in this State without change for about ninety years; but

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on the other hand, that these statutes relate only to the priority of claims as between different creditors of the estate of any deceased person, and were not intended in any way to relieve the husband of the primary liability which the common law cast upon him.

The will of Delia A. Atwood and the codicil thereto were in evidence. After certain special gifts, the fourth paragraph of the will charged upon the residue of her estate the payment of her debts and funeral expenses and costs of administration. It is contended that by this will the husband was relieved of liability for said funeral expenses, regardless of the common-law duty resting upon the husband to pay the same. In *Willeter v. Dobie*, 2 Kay & Johnson 647, a case decided in the English high court of Chancery in 1856, where there was a similar provision, it was held that by her will she had charged her funeral expenses on the residue of her separate estate, and that her husband was entitled to repayment of the funeral expenses out of that residue. In *Kenyon v. Brightwell*, *supra* (Ga.), reference was made to a Maryland case holding that the wife may by will expressly provide for the payment of her funeral expenses out of her estate, and that conclusion was approved and held not applicable in a case where there was no such will. In *Babbitt v. Morrison*, 58 N. H. 419, it was held that under the statute enlarging the common-law rights of a married woman, she had power to charge her separate estate with the payment of her husband's debts. It would therefore seem that Mrs. Atwood had power to charge the payment of her funeral expenses upon her separate estate by her will, and she undertook to so charge them. But the executrix proved that the husband executed a renunciation of this will, prepared by his attorneys, and filed the same in the County Court in the estate within four months after his wife's death. The court below refused to admit the renun-

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ciation in evidence, but its execution and filing were proved, and it was offered and is contained in the bill of exceptions, and as it was kept out on the objection of appellee we are of opinion that if it was competent evidence we should treat it as if it had been admitted. It is contended that Atwood did not in express terms renounce this provision for the payment of his wife's funeral expenses out of her estate. This is a misapprehension of the language of the renunciation. It sets out in full the fourth provision of the will, and then proceeds to say that he does not accept such provision, and that he hereby renounces the said provision, etc. The statute, section 13 of chapter 41 of the Revised Statutes (J. & A. ¶ 4249), entitled "Dower," provides that such a renunciation shall operate as a complete bar to any claim which said surviving husband may afterwards set up to any jointure, devise, testamentary provision or dower thus renounced. Atwood thereby renounced the testamentary provision by his wife that her funeral expenses should be paid out of her estate, and he takes in lieu thereof whatever the statutes give him. He cannot renounce the will and at the same time take any benefit under the provisions which he has renounced. Therefore this case stands here in the same position as if there had been no such testamentary provision in the will.

Gustin, the undertaker, charged this bill on his day book, where the items are given, to the husband under date of August 24, 1913, which was the day of the funeral. On the same day, on the same book, he credited the husband with payment therefor. On his ledger, which did not contain the items and obviously must have been made after the entries in the day book, he charged the total amount to the estate of Delia A. Atwood as of August 25th, and credited the payment as having been made on August 25th instead of August 24th. There was no proof that this will was

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admitted to probate, or that defendant assumed the duties of executor, but those matters seem to be assumed, and we assume them to be true. There was no proof that Mrs. Atwood left any estate, except the language of her will purporting to dispose of property. There was no proof that the husband was insolvent. The claim was filed in the name of Gustin, and he signed the affidavit attached thereto. Atwood testified that he took the assignment from Gustin at the same time that he paid the bill, and that that was a part of his arrangement with Gustin. This payment was on August 24 or 25, 1913. The assignment bears the date of August 25th, but was not filed in the County Court until September 19, 1914, more than a year thereafter. The appeal bond by which Atwood removed the case to the Circuit Court recited, among other things, that Atwood procured this assignment from Gustin on September 19, 1914. If this assignment had been procured on August 25, 1913, it would seem to be probable that when this claim was filed in the Probate Court on November 10, 1913, it would either have been filed as the claim of Atwood, or as the claim of Ralph E. Gustin for the use of Hiram H. Atwood, but this was not done. Nothing appeared in the record of the County Court before us to show that Atwood was interested in the claim before it was disallowed, except the fact that this assignment was filed in the County Court more than a year after the filing of the claim. Atwood swears that he did not order the funeral goods and services of the undertaker, although he testified that to his personal knowledge each of those items were furnished by Gustin in the interment of his wife. Mrs. Mercy M. Henry, the only surviving sister of Mrs. Atwood, and who was with her for several weeks before her death and at the time of her death and at the funeral, testified that Atwood did make the ar-

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rangements with the undertaker for the funeral. No doubt if Atwood had not paid these funeral expenses Gustin would have had a lawful claim against her estate therefor, but under the authorities we have above cited, we conclude that if the estate had paid the claim it could have deducted it from the moneys going to Atwood from his wife's estate on the ground that it was in this State his primary liability.

We are of opinion that we ought not to reverse and remand the case for a new trial merely to let in said renunciation, but that the renunciation and proof of its execution and filing being in the record, we should treat it as if it had been admitted. We therefore conclude that under the proofs in this case the husband could not, by paying the bill and taking an assignment of the claim, put himself in the position of the undertaker, but that as this was his primary liability, he should be treated as having paid the same and as suing the estate therefor in his own name, and we hold that he cannot recover therefor. The judgment is therefore reversed.

Reversed with finding of facts.

Finding of facts to be incorporated in the judgment.

We find that the claim here sued for was paid by the husband of Mrs. Atwood, and that thereafter this claim was prosecuted in the name of the undertaker for the use of said husband, and that said indebtedness was a primary liability of the husband and not of the wife's estate, and that he having paid the same cannot recover therefor against the wife's estate under the proofs in this case.

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Annie Prettyman, Administratrix, Appellant, v. Milton S. Marcy et al., Appellees.

Gen. No. 6,362.

1. **STIPULATIONS, § 23***—*what is effect of stipulations as to foreign law.* Where it was stipulated by the parties that the construction of the will in question was to be controlled by the laws of a foreign State and that the published reports and the statutes of such State were to be considered in the decision as if they had been introduced in evidence, *held* that the court could not concede that parties to a suit in the State could cast upon any court the duty of searching at its peril through the various statutes and decisions of another State to ascertain what the law is in such foreign State.

2. **WILLS, § 264***—*what words "die without lawful issue" as applied to remaindermen construed as meaning.* Where, under the terms of a will which was stipulated to be controlled by the laws of New Jersey, the widow of the testator was given the use of the real estate so long as she remained a widow, or the proceeds thereof in case of sale, and if she married or died certain payments were to be made to persons named, and the residue was to be divided equally between a son and a daughter, and if either or both should die without lawful issue the portion which would have gone to the decedent should go to the surviving brother or sister, and the widow died, and said son died after the mother, and without issue, though he had issue who died before the testator's death, and the main question was whether the words "die without lawful issue, though he had had issue who died before the testator's death, without such issue before the death or remarriage of the widow, that is before the period of distribution, *held* that under the law of such foreign State such provision meant that if either of the residuary beneficiaries died without lawful issue before the death or remarriage of the widow, the portion of the decedent should go to the surviving brother or sister, but that if they each survived the death or remarriage of the widow, they took the estate absolutely, one-half to each.

3. **WILLS, § 227***—*when expressed intent of testator governs in construction of will.* Where, in the construction of a will, it was contended that the fact that certain children had been blind from birth should have a bearing in construing the will to determine that no one but those two should have the property while either lived,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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held to interpret the will in such manner would be to make a will for the testator which he himself did not see fit to make, and that the will must be construed according to the intent expressed and not from an intent which the testator might have had in mind but did not express.

4. WILLS, § 441*—*when legatees do not consent that sum paid to life tenant out of proceeds of sale of real estate be deducted from legacies.* Where a will provided for the payment of certain legacies upon the death of the widow, the life tenant, or upon her remarriage, and further provided that the wife should have the interest on the proceeds of the property during her life in the event of sale of the real estate, as long as she remained a widow, and then contained a residuary disposition, and it was contended that because the legatees had agreed to the payment of a certain sum out of the proceeds of the sale of real estate to the widow, they had lost their right to be paid out of the balance, *held* that by consenting to such payment such legatees could not be considered as having permitted that amount to be paid from their legacies.

Appeal from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded with directions. Opinion filed April 19, 1917.

MILES & FULLER, for appellant; A. D. HARRINGTON, of counsel.

RICHARD H. RADLEY, for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

On May 2, 1913, Mary Virginia Marcy, of Philadelphia, filed in the Circuit Court of Peoria county a bill in equity in her own right and as executrix of the last will of Walter E. Marcy, her deceased husband, against Milton S. Marcy, of Peoria, wherein she claimed that by virtue of the death and will of her deceased husband, and by a true construction of the will of R. Sumner Marcy, the father of her husband, she was entitled to a certain sum of \$2,300 arising

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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from the estate of R. Sumner Marcy, and in the hands of said Milton S. Marcy as a trustee, and she sought an account from said trustee, and that securities for said sum be turned over to her if safe, and, if not, that the sum represented thereby be paid to her in money. Milton S. Marcy answered the bill denying that she had any title or interest in said fund. The cause was referred to a master to take and report the proofs and his conclusions. He reported the proofs and reported substantially in favor of complainant, except as to four legacies of \$100 each. Complainant filed exceptions in that matter, and defendant filed exceptions as to all the other matters in the report. The court overruled complainant's exceptions and sustained defendant's exceptions, and dismissed the bill for want of equity. Complainant removed the case to this court by appeal. We held that certain parties shown to be living were necessary parties to the determination of the controversy, and we therefore declined to pass upon the construction of the will involved, and remanded the cause with directions to complainant to bring in the additional parties or that her bill be dismissed for want of necessary parties. [*Marcy v. Marcy*, 200 Ill. App. 273.] The cause was reinstated in the court below. By this time Mary Virginia Marcy was dead, and Annie Prettyman was administratrix *de bonis non* with the will annexed of the estate of Walter E. Marcy, deceased, and the bill was amended, and she was substituted as complainant, and she brought in the other necessary parties, and they appeared and answered, denying her rights, and the cause was again referred to the master. It was there stipulated that it should be heard and decided upon the evidence already in the record. The master made the same findings in favor of the complainant as before. Like objections were filed and disposed of in the same manner, and the bill was again dismissed for want of equity, and the complainant appeals.

The portions of the will of R. Sumner Marcy material to this controversy are as follows:

“Item: I give and bequeath to my wife Mary S. Marcy, the use and occupation of all my real estate, so long as she remains my widow, and if my executors at any time during the widowhood of my said wife, Mary S. Marcy, should think best to sell my real estate, I hereby authorize them to do so and the said executors to make good and sufficient deed of conveyance for the same to the purchaser or purchasers thereof, the amount that the house and lot I bought of Charles Shaw, situate in Cape May City, and the house and lot that is situate on the turnpike road to the steamboat landing, less the expenses of the selling of same, to be put out at interest, my wife, Mary S. Marcy, to have the interest on same as long as she remains my widow. But if my widow should marry, or at her death, then if my real estate shall not be sold, then in that case I order all my real estate to be sold by my surviving executor, or executors, at private or public sale as he or they shall think best, as the proceeds to go as hereinafter bequeathed.

* * * * *

“Item: I give and bequeath to my son, Milton S. Marcy, One Hundred Dollars, to him, his heirs and assigns forever.

“Item: I give and bequeath to my daughter Hetty O. Miller, One Hundred Dollars, to her, her heirs and assigns forever.

“Item: I give and bequeath to my grandson Sumner M. Miller, One Hundred Dollars, and to my granddaughter Anna Miller, One Hundred Dollars, to them, their heirs and assigns forever, to be paid to them by my executors when they shall attain the age of eighteen years.

“Item: I give and bequeath the residue and remainder of my estate to be equally divided share and

share alike between my son Walter E. Marcy and my daughter Lucy E. Marcy, and if either of the said Walter E. Marcy or Lucy E. Marcy, or both should die without lawful issue, then I will and bequeath his or her share to be equally divided between his, her or their surviving brother and sister."

R. Sumner Marcy lived and died in New Jersey. The real estate referred to in the will is in New Jersey. The will was probated in New Jersey. It was stipulated in this cause that the construction of this will is to be controlled by the laws of New Jersey, and that the published reports and the statutes of New Jersey are to be considered in the decision of this case as if they had been introduced in evidence. We do not concede that parties to a suit in this State can cast upon any court herein the duty of searching at its peril through the various statutes of another State and through its decisions to ascertain what the law is in that State. Here the evidence upon which this case is to be decided is not in the certificate of evidence, but we are expected to find it, with the aid of counsel in their briefs. But we have concluded to waive this matter and decide the case upon such decisions of the courts of New Jersey as seem to us controlling. Mary S. Marcy survived her husband, and after a time the real estate referred to in the foregoing clauses of the will was sold for \$3,639.47. By agreement of the adult legatees and devisees, \$639.47 thereof was paid to the widow, \$3,000 thereof was placed in the hands of Milton S. Marcy, of Peoria, and by him invested, and he collected interest thereon and paid it to the widow, Mary S. Marcy, until her death, and thereafter paid said interest equally to Walter E. Marcy and Lucy E. Marcy, above named, until by a transaction between Walter E. Marcy and Lucy E. Marcy, the sister, Walter conveyed to Lucy certain real estate, and Lucy, in payment thereof, assigned to Walter

\$800 of her interest in said fund, and thereafter Milton paid Walter the income from \$2,300 and paid Lucy the income from \$700 until Walter died. Walter had had a child long before his father's death, and before this will was made, but that child had died in Walter's father's lifetime, and Walter left no issue surviving. The main question is whether the words "die without lawful issue" in the last part of the will above named mean die without lawful issue at any time, or die without lawful issue before the death of his mother and the period of distribution.

The first New Jersey case to which our attention is called is *Pennington v. Van Houten's Ex'rs*, decided by the chancellor in 8 N. J. Eq. 272, and by the court of errors in 8 N. J. Eq. 745. In a later New Jersey case [*Patterson v. Madden*, 54 N. J. Ed. 714] the two rules laid down in the *Van Houten* case are thus stated by that court:

"By the decision in *Pennington v. Van Houten*, as I understand it, two rules are established in the construction of wills containing limitation over by way of executory devise after the death of the original devisee without issue, viz.:

"First, if land be devised to A. in fee and a subsequent clause in the will limits such land over to designated persons in case A. dies without issue, and A. so dies, and the specified devisees are *in esse* at his death, and there is no further event expressed in the will to which the limitation over can fairly be referred, then A. takes a vested fee which becomes divested at his death and vests in those to whom the estate is limited over.

"Second, where there is an event indicated in the will other than the death of the devisee to which the limitation over is referrable (for instance the distribution of the testator's estate, or the postponement of the enjoyment of the property devised until the dev-

Prettyman v. Marcy, 205 Ill. App. 222.

isee reaches the age of twenty-one or until the exhaustion of a prior life estate), such limitation over will be considered to refer to the happening of such event, or to the death of the devisee, according as the court may determine from the context of the will and the other provisions thereof that the limitation clause is set in opposition to the event specified, or is connected with the devise itself."

The will of Abraham Van Houten, Sr., gave his wife certain property until his son, Abraham Van Houten, Jr., should arrive at the age of twenty-one years, and then gave his son the residue of his estate, with directions to the executors to manage the estate and support said son until he arrived at twenty-one years of age. It contained this clause: "But if my said son, Abraham Van Houten, should die having no children, then my will is and I do dispose of my property in the following manner:" following which was an entirely different disposition of the property. The son Abraham became twenty-one years of age and afterwards died without having had a child. It was held that the true construction of this will was that the devise over was upon the condition of the son's dying under twenty-one and without issue, and that when he arrived at the age of twenty-one he took the title relieved of the provision over. In *Williamson v. Chamberlain*, 10 N. J. Eq. 373; *Baldwin v. Taylor*, 37 N. J. Eq. 78; *Denise's Ex'rs v. Denise*, 37 N. J. Eq. 163; *Barrell v. Barrell*, 38 N. J. Eq. 60; *Bishop v. McClelland's Ex'rs*, 44 N. J. Eq. 450; *Neilson v. Bishop*, 45 N. J. Eq. 473; *Dawson v. Schaefer*, 52 N. J. Eq. 341; *Patterson v. Madden*, 54 N. J. Eq. 714; *Howell v. Gifford*, 64 N. J. Eq. 180; and *Security Trust Co. v. Lovett*, 78 N. J. Eq. 445, this rule is restated and applied in many ways to wills in substance and spirit like the one now before us. In all these cases it was held that if the devisee or legatee survives the time of distribu-

tion he takes the estate absolutely, and the gift over will take effect only in the event of the death of the first devisee or legatee before the period of distribution. The rule there is thus stated in 40 Cyc. 1505: "But where the disposition of the property which is devised over is preceded by a prior estate for life or years, then the general rule is that the death without issue refers to a death occurring during the period of the intervening estate, such as before the death of the life tenant, unless there are words in the will which show that the testator intended to refer to a death occurring before his decease, or at a later date than the termination of the particular estate." These principles have been sustained in our own Supreme Court in *Lachenmyer v. Gehlbach*, 266 Ill. 11, and the case of *Howell v. Gifford*, *supra*, is there followed. It will be observed that these authorities follow the second of the propositions laid down in *Pennington v. Van Houten's Ex'rs*, *supra*, and if they state the rule properly applicable to this case, then the complainant is entitled to a decree. Appellees contend that the case comes within the first of the propositions in the *Van Houten* case, and rely upon *Rowe's Ex'rs v. White*, 16 N. J. Eq. 411; *Ackerman's Adm'rs v. Vreeland's Ex'rs*, 14 N. J. Eq. 23; *Groves v. Cox*, 40 N. J. Law 40; *Wurts' Ex'rs v. Page*, 19 N. J. Eq. 365; *Drummond's Ex'r v. Drummond*, 26 N. J. Eq. 234; *McDowell v. Stiger*, 58 N. J. Eq. 125.

We have reached the conclusion that the second rule laid down in *Pennington v. Van Houten's Ex'rs*, is the one that controls the construction of the will in this case. Mary S. Marcy, the widow of R. Sumner Marcy, was given the use of the real estate so long as she remained his widow, or if the executors thought best to sell the real estate they could do so and put the proceeds out at interest, and pay the interest to his wife so long as she remained his widow. If the real

estate was not sold but the widow married or died, then the executors were to sell the real estate and the proceeds were to go as thereafter provided, namely, \$100 each to two sons and \$100 each to two grandchildren, and the rest of the estate to be divided equally between his son Walter and his daughter Lucy, and if either or both should die without lawful issue, then to his, her or their surviving brother and sister. If that provision meant that if they should die at any time without lawful issue then it was to go to the surviving brother and sister that would mean that they each only took a life estate under this will, and the language is not suitable for the establishment of a life estate, and a life estate could have been much more easily created, and in such case the remainder of his estate would not be equally divided share and share alike between Walter and Lucy, as the will says. We think, therefore, in harmony with the cases cited under the second rule in the *Van Houten* case, that this provision means if Walter or Lucy die without lawful issue before the death or remarriage of the widow—that is, before the period of distribution arrived—then it should go over to their surviving brother and sister; but that if they each survived the death or remarriage of Mary S. Marcy, then they took the estate absolutely, one-half to Walter and one-half to Lucy. Walter and Lucy were blind from birth, and it seems to be supposed that on that account this will should have a different construction, in order to protect Lucy after her brother's death. No doubt the testator might have made a different will, and he might have provided that no one but those two should have this property while either of the blind children were alive. But to interpret that into this will is to make a will for the testator which he did not see fit to make for himself. The will is to be construed according to the intent which the testator expressed therein and not

from an intent which he may have had in his mind but did not express. *Nice v. Nice*, 275 Ill. 397, page 400.

The words in the last paragraph above quoted: "I give and bequeath the residue and remainder of my estate" means that the four preceding legacies of \$100 each are charged upon the entire estate, and are to be paid before Walter and Lucy receive their shares. It is said that the legatees agreed that the widow might have said sum of \$639.57, and therefore they lost their right to have their legacies paid out of the \$3,000. This cannot be wholly true if, as we understand it, the two grandchildren were not yet of age. They did not join in the deed. But we are of opinion that in any event these legacies were to be paid before the residue passed to Walter and Lucy, and that by consenting that Mary S. Marcy should be paid the sum just mentioned, they cannot be considered to have permitted that to be paid from their legacies.

The decree will therefore be reversed and the cause remanded with directions to reduce the estate to money and pay the costs of this case in the Circuit Court and any proper charges and expenses of the trustee therefrom, and to pay said legatees each \$100, with interest from the date of the death of Mary S. Marcy, and from the residue pay complainant \$800 more than one-half, and Lucy E. Marcy, who now by marriage has become Lucy E. Marcy Feltus, \$800 less than one-half, and divide in the same proportion whatever income may have been accumulated during the pendency of this litigation.

Reversed and remanded with directions.

MR. PRESIDING JUSTICE NIEHAUS took no part.

Irwin v. Manley, 205 Ill. App. 232.

C. F. Irwin, Appellee, v. J. M. Manley et al., Appellants.

Gen. No. 6,408. (Not to be reported in full.)

Appeal from the City Court of Elgin; the Hon. FRANK E. SHOPEN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 19, 1917.

Statement of the Case.

Bill by C. F. Irwin, complainant, against J. M. Manley, R. H. Kramer and others, defendants, to obtain a decree that a certain city lot was not subject to the lien of a judgment obtained by Manley and Kramer for attorneys' fees against one James Sullivan, from the wife of whom, upon a decree of divorce awarding her such lot as her property, complainant purchased such lot under contract, and cross-bill by defendants seeking affirmative relief.

From a decree for complainant defendants appealed to the Supreme Court, which, in *Irwin v. Manley*, 276 Ill. 353, transferred the case to the Appellate Court.

J. M. MANLEY and R. H. KRAMER, for appellants.

CHARLES B. HAZLEHURST and GEORGE D. CARBARY, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 1748*—*when judgment affirmed for lack of evidence.* In a suit in equity by which complainant sought to obtain a decree that certain premises were not subject to the lien of a judgment obtained by the defendants, where, under a prior

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Taylor v. Craig, 205 Ill. App. 233.

Supreme Court decision, the only question left for the Appellate Court to pass upon was whether the defendants had an interest in the premises by virtue of an alleged agreement between themselves and the complainant, *held* that this was an affirmative defense upon which the defendants had the burden of proof, and as no proof of any such agreement was offered and there was none in the record, the decree must be affirmed.

Albert C. Taylor, Appellee, v. Burt Craig, Appellant.

Gen. No. 6,311. (Not to be reported in full.)

Appeal from the Circuit Court of Henry county; the Hon. EMEY C. GRAVES, Judge, presiding. Heard in this court at the April term, 1916. Reversed and remanded. Opinion filed May 9, 1917.

Statement of the Case.

Action in assumpsit by Albert C. Taylor, plaintiff, against Burt Craig, defendant, to recover a balance alleged to be due for an automobile sold by plaintiff to defendant. From a judgment for plaintiff for \$1,495, defendant appeals.

CHARLES W. ESPEY and JAMES H. ANDREWS, for appellant.

CHARLES E. STURTZ and WILLIAM C. EWAN, for appellee.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 326*—*when evidence properly excluded as not coming within matters specified in notice of special defense to action*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Taylor v. Craig, 205 Ill. App. 233.

for purchase price. In an action to recover the price of an automobile, where the defendant pleaded the general issue and gave notice of special matter of defense, setting up that plaintiff had agreed to and did recover as payment for the automobile a one-half interest in certain notes and a certain automobile, and at the trial evidence that there had been an express warranty and a breach thereof was excluded, *held* that such ruling was proper as the evidence offered did not come within the matters specified as a defense.

2. PLEADING, § 161*—*what is effect of giving notice of special defenses.* Where notice of special defenses is given, verified by an affidavit of merits, the defendant is limited, in presenting his defense, to the matters set up in the notice and affidavit of merits.

3. SALES, § 330*—*when instruction is erroneous as not based upon evidence.* Where, in an action for the purchase price of an automobile, an instruction was given to the effect that interest might be allowed on the purchase price, less a certain item of credit, from the time the purchase price was unreasonably and vexatiously withheld to the time of the trial, *held* that such instruction was erroneous as there was no evidence upon which a finding of such delay could be based.

4. INTEREST, § 23*—*when not allowed.* Mere delay in the payment of an account, caused by the making of a defense which the defendant claims to have, does not authorize the allowance of interest.

5. APPEAL AND ERROR, § 1659*—*when error in allowing interest cured.* Where interest is erroneously allowed and the amount so allowed can be definitely determined, the error can be cured by a remittitur.

6. APPEAL AND ERROR, § 1802*—*when case reversed and remanded.* Where interest is erroneously allowed and the amount thereof is unascertainable, the case should be reversed and remanded.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Martin Ringdahl, Defendant in Error, v. William O. Johnson, Receiver, Plaintiff in Error.

Gen. No. 6,326. (Not to be reported in full.)

Error to the Circuit Court of Lake county; the Hon. CLAUDE C. EDWARDS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed May 9, 1917.

Statement of the Case.

Action by Martin Ringdahl, plaintiff, against W. O. Johnson, receiver of the Chicago & Milwaukee Electric Railroad Company, a corporation, defendant, to recover damages for personal injuries resulting from being struck by defendant's street car. From a judgment for plaintiff for five hundred dollars, defendant brings error.

BULL & JOHNSON and CHARLES H. KING, for plaintiff in error.

BOWEN W. SCHUMACHER, for defendant in error.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. STREET RAILROADS, § 135*—*when question whether failure to look for approaching street car is contributory negligence is for jury.* Failure to look for the approach of a street car at a crossing is not to be considered negligence as a matter of law and does not necessarily bar a recovery, and the question whether the plaintiff is guilty of contributory negligence is one for the jury.

2. STREET RAILROADS, § 94*—*when traveler has right to assume that speed ordinance will be obeyed.* Where an ordinance requires a street car approaching a street crossing to be under the complete

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ceser v. Morehouse, 205 Ill. App. 236.

control of the motorman as to speed, a traveler at the crossing has the right to assume that the ordinance would be obeyed.

3. STREET RAILROADS, § 135*—*when question whether pedestrian crossing track is guilty of contributory negligence is for jury.* In an action for personal injuries sustained while the plaintiff was about to cross a street car track in the business district of a town where the tracks of a steam railroad company were located about one hundred feet away, and where just before the plaintiff was struck by the car in question, which was going at the rate of twelve to fifteen miles an hour, his attention was suddenly directed to a bell ringing on the gate tower of the railroad, and he for an instant looked in that direction and did not see the street car, and where there was an ordinance requiring the street car to be under complete control of the motorman as it approached street crossings, *held* that the question as to whether the plaintiff was guilty of contributory negligence was one for the jury, and that the judgment for plaintiff should be affirmed.

Eleanor Ceser, Defendant in Error, v. Herman Morehouse, Plaintiff in Error.

Gen. No. 6,339. (Not to be reported in full.)

Error to the Circuit Court of La Salle county; the Hon. EDGAR ELDERIDGE, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed May 9, 1917.

Statement of the Case.

Action in trespass by Eleanor Ceser, plaintiff, against Herman Morehouse, defendant, to recover damages for assault and battery and for an assault with intent to ravish plaintiff, alleged to have been committed by defendant upon plaintiff. From a judgment for plaintiff for \$2,800, defendant brings error.

JOHN W. DUBBS, for plaintiff in error.

BROWNE & WILEY and JAMES N. CUMMINGS, for defendant in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Gipps Brewing Co. v. City of Peoria, 205 Ill. App. 237.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

ASSAULT AND BATTERY, § 23*—*when verdict not disturbed on appeal.* In an action to recover damages for assault and battery, where the plaintiff, a woman aged nineteen years, charged that the defendant had assaulted her at various times, under promise of marriage, and the plaintiff and defendant were the sole witnesses as to what actually occurred, and the jury found for the plaintiff, held that the verdict could not be considered so manifestly against the weight of the evidence as to justify a reversal on that ground.

Gipps Brewing Company, Appellant, v. City of Peoria, Appellee.

Gen. No. 6,886. (Not to be reported in full.)

Appeal from the Circuit Court of Peoria county; the Hon. CLYDE E. STONE, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed May 9, 1917.

Statement of the Case.

Action by the Gipps Brewing Company, plaintiff, against the City of Peoria, defendant, to recover damages for cutting down the grade of two intersecting streets on which plaintiff's property abutted. From a judgment for defendant, plaintiff appeals.

GEORGE J. JOCHEM, for appellant.

B. H. RADLEY, for appellee.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Gipps Brewing Co. v. City of Peoria, 205 Ill. App. 237.

Abstract of the Decision.

1. MUNICIPAL CORPORATIONS, § 440*—*what is measure of damages for injury to property by public improvement.* Where property has been damaged, though not taken, by a public improvement, and the damage is of such a character that a recovery may be had, the measure of damages is the difference in value of the property before the improvement was constructed and the value after the improvement was completed.

2. MUNICIPAL CORPORATIONS, § 425*—*when property owner not entitled to damages for readjustment of building to conform to grade.* In an action against a city for damages to property caused by the readjustment of plaintiff's building to conform to the grade which had been legally established by the city prior to the time the building had been placed upon the premises, *held* that plaintiff was not entitled to damages.

3. MUNICIPAL CORPORATIONS, § 425*—*when city making street improvements is liable for damage to property of abutting owner.* A city in making street improvements, such as lowering the grade of a street, is liable for damages which may result to the owner of property abutting on the street.

4. MUNICIPAL CORPORATIONS, § 425*—*when city is not liable for damage sustained by abutting owner cutting down street to conform to grade.* A city is not liable for damage which the owner of property abutting on street corners may have sustained from his own voluntary act of cutting down the level of one of the streets for a sidewalk which he had constructed thereon, so as to have it conform with a sidewalk built by the city on the other street.

5. MUNICIPAL CORPORATIONS, § 882*—*what is duty of abutting property owner as to construction of improvements on land to conform to grade.* The owner of a lot abutting upon a street is required to take notice of the permanent grade which has been fixed by a city ordinance and to make permanent improvements which he places upon a lot to conform to the grade established.

6. MUNICIPAL CORPORATIONS, § 450*—*when evidence sufficient to show that market value of premises is not diminished by street improvement.* In an action against a city for damages for injury to a corner lot sustained by the cutting down by the city of the surface level of one of the streets to build a permanent sidewalk, and by the cutting down of the level of the other street by the plaintiff itself, evidence *held* sufficient to show that the market value of the premises was not diminished by the improvement made by the city, and that the plaintiff was not entitled to recover damages for its own act in cutting down the level of the other street.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Samuel H. Tinsman, Appellee, v. Independent Harvester Company, Appellant.

Gen. No. 6,390. (Not to be reported in full.)

Appeal from the Circuit Court of Kendall county; the Hon. MAZINI SLUSSEK, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed May 17, 1917.

Statement of the Case.

Action by Samuel H. Tinsman, plaintiff, against the Independent Harvester Company, defendant, to recover on a promissory note given by defendant to plaintiff for the purchase of certain patent rights. From a judgment for plaintiff for \$1,315, defendant appeals.

ALDRICH & WORCESTER, C. S. BURTON, F. W. PARKER and F. G. HANCHETT, for appellant.

CORNELIUS REARDON, for appellee; C. C. BULKLEY, of counsel.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. PATENTS, § 19*—*when infringement of, defense to action on note for purchase price.* In an action on a note where the defense was failure of consideration because certain patented inventions of the plaintiff which constituted the consideration turned out to be infringements of patents of others, held that under the express terms of the contract the matter of infringement of prior patents could not be made a legal basis of defense unless such infringement had been adjudicated by the judgment of a court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Tinsman v. Independent Harvester Co., 205 Ill. App. 239.

2. PATENTS, § 19*—*when evidence insufficient to establish defense in action for purchase price.* In an action on a note where the defense was failure of consideration because certain patented inventions of the plaintiff turned out to be infringements of the patents of others, *held* that even if such defense was legally effective, the defendant failed to establish the same by a preponderance of the evidence.

3. PATENTS, § 14*—*when purchaser holding patents may not complain of failure of consideration of note for purchase price.* In an action on a note where the defense was failure of consideration because certain patented inventions of the plaintiff which constituted the consideration turned out to be infringements of patents of other parties, contracts between the parties construed, and *held* that the defendant, who had acquired plaintiff's patent rights and had profited by the ownership thereof, and was still in their possession and control, could not rightfully defend against the consideration to be paid therefor on the ground that some one claimed an infringement, even if the evidence disclosed that such a claim had been made.

4. EVIDENCE, § 475*—*what does not constitute preponderance.* In an action on a note where the defense was failure of consideration because certain patented inventions of the plaintiff turned out to be infringements of patents of others, where one expert for the defendant testified that most of the plaintiff's devices were substantially covered by prior patents to others, and one expert produced by the plaintiff testified to the contrary, *held* that the defendant failed to establish its defense by a preponderance of the evidence.

5. APPEAL AND ERROR, § 451*—*when objection as to admissibility of secondary evidence may not be raised.* In an action on a note where a copy was introduced in evidence instead of the original, without objection on the ground of its being a copy, *held* that such objection could not be raised for the first time on appeal.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

City of Moline, Appellant, v. Gustaf Johnson, Appellee.

Gen. No. 6,466. (Not to be reported in full.)

Appeal from the City Court of Moline; the Hon. G. O. DIETZ, Judge, presiding. Heard in this court at the April term, 1917. Affirmed. Opinion filed May 17, 1917.

Statement of the Case.

Action by the City of Moline, plaintiff, against Gustaf Johnson, defendant, to recover for damages for personal injuries sustained by reason of a defective street of defendant's. From a judgment for plaintiff for \$4,000, defendant appeals.

JAMES M. JOHNSTON, for appellant.

PETER R. INGELSON and DIETZ & SINNETT, for appellee.

PER CURIAM.

Abstract of the Decision.

1. PLEADING, § 476*—*when declaration good after verdict.* In an action against a city for personal injuries sustained in a public street, where plaintiff attempted to comply with the statute by averring the giving of notice to the city in the language of the act, and no bill of exceptions was incorporated in the record, held that, in the absence of demurrer, motion for new trial, or motion in arrest, and of anything on the defendant's part to call the attention of the trial court to the question, the declaration was good after verdict.

2. MUNICIPAL CORPORATIONS, § 1233*—*when giving of statutory notice of injuries must be alleged.* The plaintiff, in an action against a city for personal injuries, has no right of recovery unless he gives the statutory notice and avers and proves that fact.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

CASES
DETERMINED IN THE
FIRST DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1917.

City of Chicago, Defendant in Error, v. Edward Erickson, Plaintiff in Error.

Gen. No. 22,245. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN K. PRINDIVILLE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and remanded. Opinion filed April 10, 1917.

Statement of the Case.

Prosecution by the City of Chicago, plaintiff, against Edward Erickson, defendant, for making a disturbance and committing an assault in violation of a city ordinance. From a judgment of guilty and imposing a fine of fifty dollars, defendant brings error.

JAMES D. POWER, for plaintiff in error.

SAMUEL A. ETTELSON and **HARRY B. MILLER** for defendant in error; **DANIEL WEBSTER**, of counsel.

Walker v. Hilland, 205 Ill. App. 243.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

MUNICIPAL CORPORATIONS, § 864*—*when evidence insufficient to sustain judgment for violation of ordinance.* On a prosecution for violation of a city ordinance, in which the defendant was fined for making a disturbance and committing an assault, where there was no testimony to support the charge except that of the complaining witness, a woman, and she was flatly contradicted by the defendant, and the physical circumstances seemingly favored the defendant, and nothing in the record indicated that the parties were not of equal credibility, and where several business men of prominence had testified in support of the character of the defendant, *held* that the city had failed to establish the charges by a preponderance of the evidence.

Sydney Walker, Defendant in Error, v. Charles Hilland, Plaintiff in Error.

Gen. No. 22,260. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. DENNIS W. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed on remittitur. Opinion filed April 10, 1917.

Statement of the Case.

Action by Sydney Walker, plaintiff, against Charles Hilland, defendant, to recover damages for injury to plaintiff's automobile due to a collision with defendant's automobile. From a judgment for plaintiff for \$298.31, defendant brings error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topics and section number.

Hirtzel v. Ball, 205 Ill. App. 244.

J. A. BLOOMINGSTON, for plaintiff in error.

CHARLES B. OBERMEYER, for defendant in error.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. AUTOMOBILES AND GARAGES, § 3^a—*when evidence sufficient to sustain judgment for plaintiff in action for damages for collision between automobiles.* In an action to recover damages for injuries to the plaintiff's automobile sustained in a collision with an automobile of the defendant, where such collision occurred near a street intersection, and the defendant reached the intersection first and had the right of way in the usual course of driving, and the plaintiff claimed that he was forced to the curb by the defendant's wrongfully taking a short cut, *held* that under the conflicting evidence the judgment in favor of plaintiff should not be disturbed.

2. APPEAL AND ERROR, § 1659^a—*when judgment sustained upon remittitur.* Where in an action for damages for injuries to an automobile the testimony as to damages appeared unsatisfactory, but it also appeared that the court could ascertain from competent evidence what was the reasonable cost of necessary repairs, *held* that upon remittitur of the amount of certain items, the judgment for plaintiff should be sustained.

Cora B. Hirtzel, Defendant in Error, v. Annie Ball,
Plaintiff in Error.

Gen. No. 22,286. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH P. RAFFERTY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed on remittitur. Opinion filed April 10, 1917. Rehearing denied May 10, 1917.

Statement of the Case.

Action by Cora B. Hirtzel, plaintiff, against Annie Ball, defendant, to recover for the value of services

^aSee Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

rendered as an attorney. From a judgment for plaintiff for \$600, defendant brings error.

HEFFRON, PERKINSON & BERLET, for plaintiff in error.

FEISENTHAL & WILSON, for defendant in error; DAVID LEVINSON, of counsel.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. ATTORNEY AND CLIENT, § 126*—*when agreement to pay usual fee implied.* In the absence of an express agreement as to the amount of compensation to be paid an attorney for his services, there is an implied contract to pay the usual and customary fee.

2. ATTORNEY AND CLIENT, § 127*—*when judgment for services excessive.* In an action for attorney's fees for services, rendered mostly in securing an abandonment of proceedings before the Board of Local Improvements under a resolution to pave an alley, where the plaintiff sued for \$1,000 and the verdict was for \$600, and two experienced attorneys testified that such services were worth from \$800 to \$1,000, and no evidence to the contrary was introduced, held that the judgment should be affirmed on a remittitur of \$100.

3. ATTORNEY AND CLIENT, § 123*—*what is effect of testimony of experts as to value of services of attorney.* A court is not bound by the testimony of experts as to the value of services of an attorney, and should take into consideration its own knowledge of the value of such services

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Alexander Lips et al., Plaintiffs in Error, v. Anton J. Cermak, Bailiff, and Anna L. McCoid, Defendants in Error.

Gen. No. 22,289. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. D. H. WAMSLER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed April 10, 1917.

Statement of the Case.

Proceedings for trial of the right of property in an automobile, levied upon under an execution in favor of defendant McCoid, by Alexander Lips and Benjamin F. Nysewander, Jr., by J. L. Nysewander, his next friend, plaintiffs, against Anton J. Cermak, bailiff of the Municipal Court, and Anna L. McCoid, defendants. From a judgment dismissing the suit for misjoinder of parties plaintiff, plaintiffs bring error.

HARRY H. FELGAR, for plaintiffs in error.

ARTHUR B. MCCOID and **NELS H. OLSEN**, for defendants in error; **OTTO C. RENTNER**, of counsel.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. **EXECUTION**—*when proceedings for trial of right of property dismissed for misjoinder of plaintiffs.* In proceedings for trial of right of property levied on under an execution, where it was claimed that the automobile in question was taken in exchange by one of the plaintiffs and that it was left with the other plaintiff to sell under an agreement that he was to have all he realized from a sale above a certain amount, *held* that the mere contract to sell

Galewski v. Clover Leaf Casualty Co., 205 Ill. App. 247.

did not give the plaintiff having such contract the standing of a claimant, and that the motion of the defendant to dismiss for misjoinder of plaintiffs was properly granted.

2. EXECUTION, § 122*—*what is purpose of proceedings for trial of right of property.* In proceedings for trial of right of property levied on under an execution, the purpose is to determine the right to the property as against the levy.

3. EXECUTION—*when proceedings for trial of right of property may not be maintained by claimants jointly.* In proceedings for trial of right of property, where one person claimed the title to the automobile in question and another claimed merely an interest in the proceeds of a sale of the automobile, held that the property could not have been awarded to both claimants, and that therefore the action could not be maintained by them jointly.

Theofila Galewski, Appellee, v. Clover Leaf Casualty Company, Appellant.

Gen. No. 22,309. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. J. J. COOKE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and remanded. Opinion filed April 10, 1917. Rehearing denied April 24, 1917.

Statement of the Case.

Action by Theofila Galewski, plaintiff, against the Clover Leaf Casualty Company, a corporation, defendant, to recover on an accident policy for the death of the husband of plaintiff. From a judgment for plaintiff, defendant appeals.

BRADLEY, HARPER & EHEIM, for appellant; SAMUEL A. HARPER and EDWARD J. FARRELL, of counsel.

S. P. DOUTHART and FRED C. SMITH, for appellee; GUERIN & BARRETT, of counsel.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Galewski v. Clover Leaf Casualty Co., 205 Ill. App. 247.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 800*—*what must be contained in bill of exceptions.* Points urged for a reversal, relating to the sufficiency of the evidence and predicated on a motion for new trial as recited in the clerk's transcript, cannot be considered in the absence of such motion from the bill of exceptions.

2. APPEAL AND ERROR, § 1512*—*when improper remarks of court as to comparative weight of negative and positive evidence are reversible error.* In an action upon an accident insurance policy to recover for death, where the plaintiff claimed that death resulted from an infection in the internal ear, which started from the blood caused by a wound sustained in an accident, and the defendant claimed that such an infection could not have been caused by an external injury like the one in question, and the question of liability hinged on whether the trouble antedated the accident, and plaintiff's evidence on that subject was mainly of a negative character, to the effect that the witnesses never knew of such a trouble, and the defendant offered direct and positive evidence that the insured had chronic internal ear trouble prior to the accident which developed into a septic condition that caused his death, *held* that remarks of the trial judge calculated to convey to the minds of the jury the impression that negative evidence was as strong and conclusive as positive evidence to the contrary constituted reversible error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Henry Marble Company, Appellee, v. William T. Church, Trustee, Appellant.**Gen. No. 22,321.**

1. **MECHANICS' LIENS, § 57*—*who is not contractor.*** In mechanic's lien proceedings, where the complainant sought to enforce a lien as contractor for the work of replacing certain marble tiling in a building of the defendant, and it appeared that a party wall existed between such building and the one adjoining, and that the holder of a 99-year leasehold of such adjoining premises made a contract with a construction company for the demolishing of the building adjoining that of the defendant, and for the foundation and masonry work of a new one, such contract providing for excavations under the party wall, the protection of the defendant's building and the furnishing and replacing of materials which might become injured in the doing of the work, and such construction company employed complainant to do such replacing work, *held* that complainant did not sustain the relation of contractor to the defendant, under the terms of section 1 of the Mechanics' Liens Act of 1903 (Hurd's Rev. St. 1911, p. 1477, J. & A. ¶ 7139), in force at the time in question.

2. **MECHANICS' LIENS, § 59*—*who is subcontractor.*** In mechanic's lien proceedings, where the complainant sought to enforce a lien as contractor for the work of replacing certain marble tiling in a building of the defendant, where it appeared that a party wall existed between such building and the one adjoining, and that the holder of a 99-year leasehold of such adjoining premises made a contract with a construction company for the demolishing of the building adjoining that of the defendant, and for the foundation and masonry work of a new building, such contract providing for excavation under the party wall, the protection of the defendant's building and the furnishing and replacing of materials which might become injured in the doing of the work, and the construction company made a contract with complainant to do such replacing work, *held* that the complainant was not a contractor under section 1 of the Mechanics' Liens Act of 1903 (J. & A. ¶ 7139), but was a subcontractor as defined in section 21 of said Act (J. & A. ¶ 7159), and that, as no attempt was made by averment or proof to bring complainant within the provisions of said section 21, it was needless to discuss whether he had any right to a lien as a subcontractor.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Henry Marble Co. v. Church, 205 Ill. App. 249.

3. MECHANICS' LIENS, § 61*—*what is effect of waiver of lien by contractor.* A mechanic's lien cannot be enforced by a subcontractor where the contractor has waived his lien.

Appeal from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed with directions. Opinion filed April 10, 1917.

CHURCH, SHEPARD & DAY, for appellant; HOWARD W. LEWIS, of counsel.

OTTO W. JURGENS, for appellee; GEORGE H. MASON, of counsel.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

In 1912, and up to the date of this proceeding to enforce a mechanic's lien, appellant owned the fee to a certain Lot 2, and one Mayer a 99-year leasehold to the adjoining Lot 1. Both lots were improved with buildings. On their division line was a party wall, the agreement for which was recognized as in full force and effect. Mayer, desiring to demolish the building on his lot and to erect another in its place and having in mind his duty under the party-wall agreement (as found by the master) to support said party wall and repair any damage necessarily occasioned to appellant's premises in carrying out his plans of construction, entered into a contract with the Falkenau Construction Company for the foundation and masonry work of his building, which provided for excavations below the party wall, and that the Falkenau Company should protect appellant's building from all damages and injury during the erection of Mayer's building and should "furnish and replace materials, etc., which in any way might become injured or damaged by reason of the work under said building con-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

tract." The specifications for Mayer's new building provided for such restoration and constituted a part of Mayer's contract with said Falkenau Company. By way of assurance Mayer showed appellant such provision in the specifications and verbally promised—what he was in duty bound to do under the party-wall agreement—to repair any damage that might be incurred to appellant's building. The Falkenau Company proceeded with its work shortly after entering into said contract. To do necessary underpinning and shoring of the party wall the Falkenau Company's workmen entered appellant's building and took out the marble tile floor from part of its basement, which appellee, pursuant to its contract with the Falkenau Company, subsequently restored. For furnishing said work and material it seeks to enforce a mechanic's lien on appellant's lot and building.

Shortly after the completion of the foundation work, appellant demanded of Mayer the restoration of his premises to their original condition. Thereupon Mr. Falkenau of the Falkenau Company called up appellant by telephone and asked if he would consent to a change of material for the floor. Appellant refused his consent insisting on restoration of the basement floor to its original condition, and accordingly it was relaid with marble tiling by appellee pursuant to its contract with the Falkenau Company. For the cost of such work and the interest thereon a decree was entered for a mechanic's lien on the land and improvements of appellant. In the view we take of the case it is immaterial whether appellant knew that the Falkenau Company had sublet that work to appellee.

The master in chancery to whom the case was referred for his conclusions of fact found the facts substantially as above stated, but they do not support appellee's claim to a mechanic's lien, which is predicated entirely on the theory that appellee was a contractor

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as defined by section 1 of the Mechanics' Liens Act of 1903, then in force, which reads as follows:

"Any person who shall by any contract * * * with the owner of a lot * * * or with one whom such owner has authorized or knowingly permitted to contract for the improvement of or to improve the same, furnish material * * * for the purpose of repairing any * * * building * * * shall be known under this act as a contractor."

(Hurd's Rev. St. 1911, p. 1477, J. & A. ¶ 7139.)

The findings of the master and the record clearly show that the labor and material furnished by appellee were furnished pursuant to its contract with the Falkenau Construction Company. If under the terms of said section, therefore, any one held the relation of contractor to appellant as owner, it was either Mayer or the Falkenau Company, the former on the theory that he furnished the material and work by contract with appellant as owner, and the latter on the theory that it furnished the material and work under a contract with Mayer for the improvement and that appellant as owner authorized or permitted Mayer to enter into such contract with the Falkenau Company. But under neither theory nor the above state of facts does appellee occupy the position of contractor as defined by the statute and therefore it could not enforce a lien as such, because appellant neither made a contract with the Falkenau Company nor authorized it to make one with appellee. On the contrary, it clearly appears that appellee was a subcontractor, as defined in section 21 of said Act, which reads:

"Every mechanic, workman or other person who shall furnish any materials, * * * or furnish or perform services or labor for the contractor shall be known under this act as a subcontractor."

(Hurd's Rev. St. 1911, p. 1483, J. & A. ¶ 7159.)

No attempt was made by averment or proof to bring appellee within the provisions of the statute giving a

lien to a subcontractor. It is needless, therefore, to discuss whether appellee had any right to a lien as such. The theory on which the bill was brought was not supported by the proof or findings of the master and court, and hence it should have been dismissed for want of equity.

But even if appellee were entitled to a lien as subcontractor, it cannot be enforced, in our opinion, because of provisions in the contract with the Falkenau Company whereby the latter, in effect, waived its right to any lien for work done on appellant's premises. It expressly agreed to protect appellant's building from all damages and replace materials in any way injured or damaged by reason of its work, the cost whereof was to be included in the price for Mayer's building. If the contractor waives his lien the subcontractor cannot enforce one. *Kelly v. Johnson*, 251 Ill. 135.

And upon the said state of facts it is questionable in view of Mayer's obligation under the party-wall agreement to make good the damages so sustained by appellant, and of the fact that the restoration was made pursuant thereto and not pursuant to a new contract with appellant, whether even the Falkenau Construction Company could, as against appellant, be deemed a contractor under section 1 of said Act (J. & A. ¶ 7139).

The decree will be reversed with directions to dismiss the bill for want of equity.

Reversed with directions.

Mack v. General Accident Fire & Life Assur. Corp., 205 Ill. App. 254.

Edward D. Mack, Appellee, v. General Accident Fire & Life Assurance Corporation, Limited, Appellant.

Gen. No. 22,331. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and judgment here with findings of fact. Opinion filed April 10, 1917.

Statement of the Case.

Action by Edward D. Mack, plaintiff, against the General Accident Fire & Life Assurance Corporation, Limited, defendant, to recover on an accident insurance policy. From a judgment in favor of plaintiff for \$810, defendant appeals.

JOHN A. BLOOMINGTON, for appellant.

M. D. DOLAN, for appellee; FREEMAN K. BLAKE, of counsel.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

INSURANCE, § 435*—*when claim should be prorated because insured was engaged in more hazardous employment.* In an action upon an accident insurance policy, where the rate of premium was based upon the occupation of the assured, and where liability was not disclaimed, but it was contended by the defendant that plaintiff was injured in doing an act in an occupation classified as more hazardous than that stated in his application, and that therefore his claim should be prorated, and where, although plaintiff was insured on the basis of being engaged as mill proprietor with office work, he was engaged in the more hazardous occupation of super-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

American T. & S. Bk. v. A. Bauer Dist. & Imp. Co., 205 Ill. App. 255.

intending work, prior to and at the time of being injured, *held* that the judgment in favor of plaintiff on the basis of his being engaged as a mill owner with office work should be reversed, and a judgment entered in the Appellate Court on the basis of his being engaged in superintending work.

**American Trust & Savings Bank, Appellee, v. A.
Bauer Distilling & Importing Company, Appel-
lant.**

Gen. No. 22,340. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed April 10, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by the American Trust & Savings Bank, a corporation, plaintiff, against A. Bauer Distilling & Importing Company, defendant, to recover on a promissory note. From a judgment for plaintiff, defendant appeals.

JAMES R. WARD, for appellant.

MCGILVRAY, EAMES & VAUGHAN, for appellee.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. CORPORATIONS, § 387*—*when knowledge of officer received in unofficial capacity not imputed to corporation.* In an action on a note by a banking corporation, which received the same in good

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

American T. & S. Bk. v. A. Bauer Dist. & Imp. Co., 205 Ill. App. 255.

faith for value, before maturity, where it was claimed that the note was *ultra vires*, and also that it was given for accommodation, and that such facts were known to the vice president of the bank, who was also a director of the corporation for whose benefit the note was negotiated, *held* that the knowledge of such officer acquired, not while acting in his official capacity for the bank, but casually and through his individual relation to such other corporation, could not be charged to the plaintiff.

2. CORPORATIONS, § 450*—*what is power of to execute notes.* A corporation has power to execute notes for purposes incident to the transaction of its business, and such notes will be presumed to have been executed in the legitimate course of business, and, whether so executed or not, will be valid in the hands of bona fide holders without notice.

3. BILLS AND NOTES, § 50*—*when note based on sufficient consideration.* In an action on a note by a bank, where the defendant claimed that the note was in fact given to take up a like note apparently given for accommodation, but the good faith of the bank, which received the note before maturity, without notice of infirmity and in the usual course of business, was not impeached, *held* that as the note was given to take up another note it could not be said to have been without consideration.

4. BILLS AND NOTES, § 255*—*when bank innocent purchaser for value of note given in payment of accommodation note.* Where an accommodation note is negotiated to or discounted by a bank in the usual course of business, without notice of its real character, the payment thereof by another note, also taken without notice, does not deprive the bank of its position as an innocent purchaser for value.

5. BILLS AND NOTES, § 479*—*when questions relative to protest fees on note not reviewed.* Where in an action on a note the protest fees were not put in issue by the defendant's affidavit of merits, points made on the question of the proof of such fees will not be considered on appeal.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Shadauski v. Chicago Railways Co., 205 Ill. App. 257.

**Joseph Shadauski, otherwise known as Joseph Schultz,
Appellant, v. Chicago Railways Company, Appel-
lee.**

Gen. No. 22,186. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed April 10, 1917.

Statement of the Case.

Action by Joseph Shadauski, otherwise known as Joseph Schultz, plaintiff, against the Chicago Railways Company, defendant, to recover damages for personal injuries received while working as car repairer for defendant street railroad. From a judgment against plaintiff for costs, plaintiff appeals.

WYMAN, JURGENS & CARPENTER, for appellant.

J. B. GUILLIAMS and FRANK L. KRIETE, for appellee.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

MASTER AND SERVANT, § 697*—*when evidence insufficient to show negligence of street car repair foreman in handling trolley pole while employee is on ladder on side of car.* In an action for personal injuries by a street car repairer employed by the defendant street car company, where the declaration alleged that while plaintiff was stepping from a ladder, leaning against a car, to the roof of such car, a foreman negligently caught hold of the broken trolley pole and pulled it down so violently that the car rocked, whereby the ladder slipped and plaintiff was thrown, and plaintiff testified that the foreman loosened the pole and let it go up easy, and the sole negligence relied upon was the manner in which the foreman handled the pole, *held* that the evidence wholly failed to sustain the charge of negligence, but that on the contrary it tended to show that the foreman was free from any negligence in handling the pole.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Stoddard v. Illinois Imp. & Ballast Co. et al., 205 Ill. App. 258.

Horace H. Stoddard, Appellant, v. Illinois Improvement & Ballast Company and H. C. Greer, Appellees.

Gen. No. 22,203. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. HARRY C. MORAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed April 10, 1917.

Statement of the Case.

Action of forcible entry and detainer by Horace H. Stoddard, plaintiff, against the Illinois Improvement & Ballast Company, a corporation, and H. C. Greer, defendants, to recover possession of premises leased for quarrying purposes. From a judgment for defendants, plaintiff appeals.

EARL J. WALKER, for appellant.

KNAPP & CAMPBELL, for appellees; JOHN R. COCHRAN, of counsel.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 463*—*what does not work forfeiture of lease.* The breach of an implied covenant will not work a forfeiture of a lease, the only available remedy for such breach being an action for damages.

2. MINES AND MINERALS, § 38*—*when action of forcible entry and detainer does not lie in favor of landlord against tenant.* An action of forcible entry and detainer will not lie for breach of an implied covenant in a mining lease to quarry stone with reasonable diligence, if found and so long as it is found in profitable quantities.

3. MINES AND MINERALS, § 22*—*when implied covenant that stone will be quarried with reasonable diligence exists.* Where a quarry-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Fendl et al. v. George J. Cooke Co., 205 Ill. App. 259.

ing lease contains no express covenant requiring the lessees to quarry any definite amount of stone, there is merely an implied covenant that stone will be quarried with reasonable diligence, if found, and so long as it is found in quantity and kind that might be quarried with a profit to the lessees.

Louis Fendl and W. C. Virkus, copartners, trading as Fendl & Virkus, Defendants in Error, v. George J. Cooke Company, Plaintiff in Error.

Gen. No. 22,242. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN R. NEWCOMER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed. Opinion filed April 10, 1917.

Statement of the Case.

Action by Louis Fendl and W. C. Virkus, copartners, trading as Fendl & Virkus, plaintiffs, against George J. Cooke Company, a corporation, defendant, to recover a deposit made under a written contract for the purchase of beer exclusively from defendant and for the installation of fixtures and plumbing in plaintiff's saloon by defendant, and damages for the breach of such contract. From a judgment for plaintiffs for \$275, defendant brings error.

JOHN C. SLADE, ROBERT J. FOLONIE and HENDRIK FOLONIE, for plaintiff in error.

COBURN & BENTLEY, for defendants in error.

MR. JUSTICE McDONALD delivered the opinion of the court.

Fendl et al. v. George J. Cooke Co., 205 Ill. App. 259.

Abstract of the Decision.

1. **CONTRACTS, § 387***—*when evidence insufficient to show fulfillment of contract by saloon keeper for purchase of beer and use of bar fixtures.* In an action for the return of money deposited pursuant to a contract under which the defendant installed fixtures and plumbing in the plaintiffs' saloon, and plaintiffs agreed to sell the defendant's beer exclusively for a period of two years, and for damages sustained for breach of the contract, where the deposit money was to be returned to the plaintiffs with interest at the expiration of said two years in the event of a compliance with such contract, and it appeared that there were some objections to the fixtures furnished but that they were usable, and plaintiffs ordered the defendant to remove the fixtures and they did so, and plaintiffs discontinued doing business after the expiration of about six months after entering into the contract because of their failure to procure a license and not because of any breach of contract by the defendant, *held* that the fulfillment of the contract by the plaintiffs was a condition precedent to their right of recovery of the deposit, and that they failed to make such proof.

2. **CONTRACTS, § 294***—*when performance by plaintiffs is essential to recovery for breach.* In an action to recover money deposited with the defendant, where such money was deposited under a contract providing that the same should be returned in the event that the plaintiffs should, during the period specified, purchase the beer of the defendant exclusively during the period and in the quantity specified, *held* that the fulfillment of such contract by the plaintiffs was a condition precedent to a right of recovery of such deposit and for damages for breach of the contract, and that the fact that the fixtures were defective could not be taken advantage of by the plaintiffs to strengthen their case.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Elizabeth Arado, Plaintiff in Error, v. David Arado,
Defendant in Error.****Gen. No. 22,263.**

1. **MARRIAGE**—*when doctrine of estoppel inapplicable to uphold marriage.* In divorce proceedings where the parties were first cousins and the marriage was ceremonial and the parties had lived together as husband and wife for many years, and children had been born who were still living, and the bill was dismissed for want of equity and a decree annulling the marriage entered, *held* that the doctrine of estoppel could not be invoked to uphold a relationship which the statute expressly condemned and declared void.

2. **MARRIAGE, § 4***—*when marriage between first cousins is void.* A marriage between first cousins in violation of section 1 of the Marriage Act, ch. 89, Hurd's Rev. St. (J. & A. ¶ 7345), declaring such marriages to be incestuous and void, is not only voidable but void.

3. **MARRIAGE, § 4***—*when between first cousins not declared to be valid.* Where a marriage between first cousins was annulled and it was contended that such marriages were only voidable and not void, *held* that as such marriages had been declared incestuous and void by section 1 of the Marriage Act (J. & A. ¶ 7345), and as the crime of incest was made a felony by section 157 of the Criminal Code, ch. 38, Hurd's Rev. St. (J. & A. ¶ 3775), that to declare valid a marriage, the consummation of which was made a felony, would be unreasonable and would be against the express public policy of the State.

4. **MARRIAGE**—*when fact that performance of is by minister of church of parties is immaterial.* Where a marriage between first cousins was annulled as in violation of section 1 of the Marriage Act (J. & A. ¶ 7345), and it was contended that because such marriage was sanctioned by the church of which the parties were members, and as the marriage was performed by a minister of that church, it should be upheld under section 5 of the Marriage Act (J. & A. ¶ 7349), providing that persons belonging to any religious church, etc., might celebrate their marriage according to the rules and principles of such church, *held* that such section referred only to the celebration of marriages, and presupposed that the parties thereto would not come within the inhibitions of said section 1.

5. **DIVORCE, § 135***—*when alimony and solicitor's fees properly disallowed.* Alimony and solicitor's fees *held* properly disallowed

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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where the bill for divorce was dismissed and the marriage annulled on the ground that the parties were first cousins, and the alleged marriage was thus void in its inception.

Error to the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed April 10, 1917.

KING, BROWER & HURLBUT, for plaintiff in error.

CHARLES P. MOLTHROP, for defendant in error.

MR. JUSTICE McDONALD delivered the opinion of the court.

This writ of error brings up for review a proceeding wherein plaintiff in error's bill for divorce was dismissed for want of equity and a decree annulling the marriage between the parties was entered on defendant's cross-bill.

The pleadings admitted that the complainant, Elizabeth Arado, and the defendant, David Arado, entered into a ceremonial marriage on October 4, 1894, and for many years thereafter lived together and cohabited as man and wife; that, as the fruits of the said marriage, two children were born to them, both of whom are still living; that complainant and defendant were cousins of the first degree.

Section 1 of our Marriage Act, ch. 89, Hurd's Rev. St. of Illinois (J. & A. ¶ 7345), is as follows:

"That hereafter marriages between * * * cousins of the first degree, are declared to be incestuous and void."

It is insisted by complainant that notwithstanding the aforesaid provision of the statute declaring marriages between cousins of the first degree to be incestuous and void, such marriages are in fact only voidable.

The Legislature, in the interest of morality and for the protection of society, has declared such marriages

to be incestuous and void, and in so doing has by statute clearly expressed the public policy of this State with respect thereto. By section 157 of our Criminal Code, ch. 38, Hurd's Rev. St. of Illinois (J. & A. ¶ 3775), the crime of incest is made a felony, punishable by imprisonment in the penitentiary. It is difficult to conceive of a marriage having any validity, the consummation of which is made a felony. And to so hold would be to do violence to reason and to utterly disregard the express public policy of the State. *Williams v. McKeene*, 193 Ill. App. 615; *In re Wittick's Estate*, 164 Iowa 485, 145 N. W. 913; *Wilson v. Cook*, 256 Ill. 463.

Complainant also invokes the doctrine of estoppel to preclude defendant from assailing the validity of the marriage. Such doctrine cannot be invoked to uphold a relationship which the statute expressly condemns and declares void. Furthermore, where both parties are *particeps criminis*, as in the case at bar, the doctrine can have no application.

It is also contended that marriages between cousins of the first degree are sanctioned by the church of which the parties hereto were members, and that inasmuch as the marriage ceremony was performed by a minister of that church, it should be upheld under section 5 of our Marriage Act (J. & A. ¶ 7347), which provides that "All persons belonging to any religious society, church or denomination, may celebrate their marriage according to the rules and principles of such religious society, church or denomination." It is a sufficient answer thereto to state that this section refers only to the *celebration* of marriages, and presupposes that the parties thereto do not come within the inhibitions of section 1, *supra*.

It is finally urged that the court erred in refusing to allow complainant alimony and solicitor's fees.

The allowance of alimony and solicitor's fees con-

Glenridge Coal Co. v. Marion County Coal Co., 205 Ill. App. 284.

templates, as a basis therefor, a valid or at least a voidable marriage contract; and it appearing from the pleadings that the alleged marriage contract in question was void in its inception, the relation of husband and wife never existed between the parties hereto, and hence the court properly refused to make such allowance to the complainant. *McKenna v. McKenna*, 70 Ill. App. 340.

Finding no reversible error, the decree will be affirmed.

Affirmed.

Glenridge Coal Company et al., Appellants, v. Marion County Coal Company, Appellee.
Marion County Coal Company, Appellee, v. Glenridge Coal Company et al., Appellants.

Gen. No. 22,280. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. FREDERICK A. SMITH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. *Affirmed*. Opinion filed April 10, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Bill by Glenridge Coal Company, Knowlton L. Ames and Thomas C. Loucks, complainants, against the Marion County Coal Company, defendant, for an accounting and damages for an alleged breach of contract for the sale of coal, and cross-bill by defendant to recover for coal sold and delivered. From a decree in favor of defendant on its cross-bill for \$7,842.86 and dismissing complainants' bill for want of equity, complainants appeal.

Glenridge Coal Co. v. Marion County Coal Co., 205 Ill. App. 264.

WALTER W. ROSS, for appellants.

MAYER, MEYER, AUSTRIAN & PLATT and NOLEMAN & SMITH, for appellee.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 83*—*when seller has right to cancel contract for failure to make stipulated payments.* On a bill for an accounting and for damages for breach of contract, where the defendant, as owner and operator of a coal mine, had made a contract with the complainant for the exclusive right to sell the output of such mine with an exception as to sale within a certain radius, and where the time for payment was fixed to meet pay days of the defendant, and defendant had to rely upon regular remittances in order to keep its mine in operation, and, against the continued objections of the defendant as to irregularity in payments, the complainant failed to make payments as provided for, and the defendant finally canceled the contract after a large amount had become overdue, contract construed and *held* that, inasmuch as time was clearly of the essence of the contract, the defendant was justified in canceling such contract because of the failure to make payments as provided, and that the dismissal of the bill for want of equity was proper.

2. CONTRACTS, § 330*—*what does not constitute waiver of past breaches.* The continuation of a contract in force after various breaches does not constitute a waiver of past breaches, where the alleged waivers are conditioned upon the future fulfillment of the contract.

3. CONTRACTS, § 345*—*when action for breach may not be maintained.* An action for breach of a contract cannot be maintained where the complaining party is in default.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hedrich v. United States Brewing Co., 205 Ill. App. 266.

Louis F. A. Hedrich, Defendant in Error, v. United States Brewing Company, Plaintiff in Error.

Gen. No. 22,292. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and remanded. Opinion filed April 10, 1917.

Statement of the Case.

Action by Louis F. A. Hedrich, plaintiff, against the United States Brewing Company, defendant, to recover rent for the lease of premises by defendant from plaintiff. From a judgment for plaintiff for \$198.79, defendant brings error.

WINSTON, PAYNE, STRAWN & SHAW, for plaintiff in error; ARTHUR C. MARRIOTT, of counsel.

JOSEPH G. SHELDON, for defendant in error.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT—*when lease construed against party drafting it.* The whole of a lease must be considered, and force and meaning given to every part, if possible, and doubtful and inconsistent reservations or conditions should be given a construction least favorable to the party drafting the instrument.

2. LANDLORD AND TENANT, § 76*—*when tenant no right to terminate lease.* In an action to recover rent on a lease of premises for the term of one year, where the lease was drafted by the defendant, and provided that it was made on condition that a saloon license would issue, and that in the event of the city's refusal to issue a license or its revocation of one theretofore issued, the lessee might

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Fingado v. Wilson Braiding & Embroidering Co., 205 Ill. App. 267.

terminate the lease on ten days' written notice, and that, in case of destruction or rendering of the premises uninhabitable by fire, rent should abate until the premises were rebuilt or rendered fit for occupancy, and in case of failure to rebuild or repair the lease might be terminated upon notice, and that the lessee reserved the right to terminate the lease at any time on ten days' notice, *held* that the ten-day cancellation provision had application only in case of total destruction by fire, or failure to put the premises in habitable condition after damage by fire, and that consequently the defendant did not have the right to terminate the lease at any time.

3. LANDLORD AND TENANT, § 321*—*when exclusion of evidence in action for rent is reversible error.* Where, in an action for rent under a lease, one of the issues involved was the ownership of certain property which the lessee removed from the demised premises, and plaintiff introduced evidence as to his ownership and installation of the property, and defendant offered countervailing evidence that it had installed the property, and an objection by plaintiff to such evidence was sustained, *held* that as the value of the property was included in plaintiff's claim and constituted part of the allowance of damages, the refusal to admit such evidence constituted reversible error.

Gustave Fingado, Appellee, v. Wilson Braiding & Embroidering Company, Appellant.

Gen. No. 22,300.

1. ASSIGNMENTS, § 33*—*when pleading not supported by personal affidavit as to ownership of assigned claim is defective.* In an action in the Municipal Court upon an account, where plaintiff's statement of claim alleged an assignment of the account to him for valuable consideration, and was supported by the affidavit of plaintiff's attorney which alleged that the plaintiff was then the actual bona fide holder of the account, and the defendant, in his affidavit of merits, disclaimed knowledge of the supposed assignment and stated upon information and belief that the plaintiff was not the actual bona fide owner and holder of the account, and defendant's affidavit was stricken from the files and its counter-motion to strike

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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plaintiff's statement was denied, and, upon the defendant's electing to stand by its affidavit of merits, default was taken and judgment entered, *held* that in failing to support his statement of claim by his personal affidavit as required by section 18 of the Practice Act (J. & A. ¶ 8555), the plaintiff failed to state a cause of action, and that therefore the denial of the defendant's motion to strike such statement of claim from the files was error.

2. STATUTES, § 234*—*how statute in derogation of common law construed.* A statute which is in derogation of the common law must be strictly construed, and a strict compliance therewith is indispensable.

3. STATUTES, § 234*—*how statute requiring affidavit of ownership of assigned claim construed.* In an action in the Municipal Court upon an account, where the plaintiff's statement of claim alleged that he was the assignee of such account for valuable consideration, and the affidavit in support of such statement of claim was made by the plaintiff's attorney, *held* that section 18 of the Practice Act (J. & A. ¶ 8555), giving the assignee and bona fide holder of a chose in action the right to sue in his own name but requiring such holder to make allegations or affidavit of ownership, being in derogation of the common law, required strict construction.

Appeal from the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and remanded. Opinion filed April 10, 1917.

BAKER & HOLDER, for appellant; G. RAYMOND COLLINS, of counsel.

HENRY M. GOLDSMITH, for appellee.

MR. JUSTICE McDONALD delivered the opinion of the court.

Appellee, Gustave Fingado (plaintiff below), recovered a judgment against the Wilson Braiding & Embroidering Company for \$1,928.78, to reverse which this writ of error is prosecuted.

Plaintiff in his statement of claim alleged that the account sued upon had been assigned to him for a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

valuable consideration. The statement of claim was supported by the affidavit of plaintiff's attorney, wherein he alleged that the plaintiff was then the actual bona fide holder of said account.

Defendant filed an affidavit of merits, in which it disclaimed any and all knowledge or notice of the supposed assignment of the account in question, and stated upon information and belief that plaintiff was not the actual bona fide owner thereof, and that said account was not assigned to plaintiff for a good and valuable consideration.

On motion of the plaintiff, defendant's affidavit of merits was stricken from the files. Defendant made a countermotion to strike plaintiff's statement of claim from the files, which was denied by the court, and defendant having elected to stand by its affidavit of merits, its default was taken and the judgment in question entered against it.

The question here presented for determination is whether or not plaintiff's attorney had the right to make the affidavit required by statute, in support of plaintiff's claim.

Section 18 of the Practice Act, ch. 110, Rev. St. of Illinois (J. & A. ¶ 8555), is in part as follows:

"The assignee and equitable and *bona fide* owner of any chose in action not negotiable heretofore or hereafter assigned, may sue thereon in his own name, and he shall in his pleading on oath, or by his affidavit, where pleading is not required, allege that he is the actual *bona fide* owner thereof, and set forth how and when he acquired title," etc.

This provision of the statute being in derogation of the common law, it must be strictly construed, and a strict compliance therewith is indispensable. (*Edwards & Bradford Lumber Co. v. Bontjes*, 193 Ill. App. 392; *Leemon v. Grand Crossing Tack Co.*, 187 Ill. App. 247.) One of the requirements of the provisions of the act in question is that the assignee

Lepman & Heggie v. Inter-State Produce Co., 205 Ill. App. 370.

shall, in his pleading, on oath or by *his* affidavit, where pleadings are not required, allege that *he* is the actual bona fide owner of the chose in action. The obvious reason therefor is that such information is peculiarly within the knowledge and conscience of the assignee alone.

The statement of claim in question being unsupported by plaintiff's personal affidavit, it failed to state a cause of action under section 18, *supra*, and hence the court erred in denying defendant's motion to strike same from the files. *Hadden v. Larned*, 83 Ga. 636; *Shattuck v. Myers*, 13 Ind. 46; *Hinkle v. Lovelace*, 204 Mo. 208.

In our opinion, defendant's said motion was sufficiently definite and specific to reach this objection.

In this view of the case, it becomes unnecessary to pass upon the other points raised.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

Lepman & Heggie, Plaintiff in Error, v. Inter-State Produce Company, Defendant in Error.

Gen. No. 22,215. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. RUFUS F. ROBINSON, Judge, presiding. Heard in this court at the March term, 1916. **Affirmed.** Opinion filed April 16, 1917.

Statement of the Case.

Action in attachment by Lepman & Heggie, a corporation, plaintiff, against the Inter-State Produce Company, defendant, to recover the difference between

Lepman & Heggie v. Inter-State Produce Co., 205 Ill. App. 270.

the contract price and the market price of two cars of turkeys. From a judgment for defendant, plaintiff brings error.

FRANK SCHOENFELD, for plaintiff in error; GEORGE F. OET, of counsel.

HARFORD & LIGHTFOOT, for defendant in error; FLORENCE W. STEPHENS, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. ATTACHMENT, § 9*—*when original will not lie*. An original attachment will not lie in Illinois to recover unliquidated damages.

2. DAMAGES, § 81*—*what is distinction between liquidated and unliquidated*. Damages are said to be liquidated where they can be determined from the contract itself or from the contract and the rules of law applicable thereto, and where it is necessary to introduce evidence before plaintiff can prove his case, the damages are said to be unliquidated.

3. ATTACHMENT, § 9*—*when affidavit is for unliquidated damages*. In an original attachment action brought to recover the difference between the contract price and the market price of two cars of turkeys, where the affidavit alleged the purchase of a car of turkeys to contain a certain number of pounds of the grade designated as dry picked, dry packed and packed in barrels separate, at a certain price per pound, and that such turkeys were rejected on the ground of being frozen and of inferior quality to those purchased, and that the market value on the day in question was a certain higher price per pound, *held* that the order quashing the attachment on the ground that it appeared in the affidavit that the claim was for unliquidated damages was correct.

4. ATTACHMENT, § 9*—*what affidavit in action to recover difference between contract and market price of poultry should set forth*. In an original attachment action to recover the difference between the contract price and the market price of certain cars of poultry, *held* that the affidavit should have set forth the market price at the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

H. S. Gile Grocery Co. v. Chicago & N. W. Ry. Co., 205 Ill. App. 272.

time of the breach of the contract, which was on the day the articles should have been delivered.

5. ATTACHMENT, § 9*—*when original action does not lie against nonresident.* The fact that the defendant in an original attachment proceeding is a nonresident does not alter the rule that such an attachment will not lie to recover unliquidated damages.

H. S. Gile Grocery Company et al., Appellees, v. Chicago & Northwestern Railway Company, Appellant.

Gen. No. 22,766. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOHN COURTNEY, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917. Rehearing denied April 30, 1917.

Statement of the Case.

Action by H. S. Gile Grocery Company, a corporation, and others, plaintiffs, against the Chicago & Northwestern Railway Company, a corporation, defendant, to recover damages for failure of defendant to deliver a shipment of canned corn in good order. From a judgment for plaintiff for \$284.50, defendant appeals.

IRVING HERRIOTT and IRA C. BELDEN, for appellant;
WILLIAM G. WHEELER, of counsel.

MAURICE W. SEITZ and DUEWARD GRINSTAD, for appellees.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Moyer v. Walden W. Shaw Livery Co., 205 Ill. App. 273.

Abstract of the Decision.

CARRIERS, § 81*—*when failure of carrier to notify consignee of arrival of shipment at port of embarkation constitutes breach of contract.* In an action against a common carrier for failure to deliver a shipment of canned corn in good order, where the shipment was delivered to the defendant as the initial carrier and the car was consigned to a certain party with directions to notify the plaintiff, in care of the steamship company at a certain city, and after arriving at the dock at such city, the car was overlooked and remained on the dock for two months and a half, when notice of its arrival was given to the steamship company, and the cases were then unloaded from the car and remained at the dock for over two weeks, after which the shipment was delivered to a steamer and ultimately reached the consignee, and during all of this time no notice was given to either the consignor or consignee of the delay in shipment, *held* that under the bill of lading the defendant was required to notify the plaintiff upon the arrival of the shipment at the port of embarkation, and that leaving the car at such port without notice to either the consignor or consignee for such period constituted a breach of the contract.

C. W. Moyer, Appellee, v. Walden W. Shaw Livery Company, Appellant.

Gen. No. 22,774. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. BENJAMIN BALL, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by C. W. Moyer, plaintiff, against the Walden W. Shaw Livery Company, a corporation, defendant, to recover damages for injury to plaintiff's automobile, caused by a collision with another automobile.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.
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Moyer v. Walden W. Shaw Livery Co., 205 Ill. App. 273.

From a judgment for plaintiff for \$256, defendant appeals.

SABATH, STAFFORD & SABATH, for appellant; CHARLES B. STAFFORD, of counsel.

MAX KRAUSS, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. AUTOMOBILES AND GARAGES, § 3*—*when question of negligence and contributory negligence of drivers of colliding automobiles are for jury.* In an action to recover damages for injury to an automobile sustained in a collision between an automobile of the plaintiff and a taxicab of the defendant at a street crossing, where the testimony was widely at variance, *held* that the questions whether the accident was caused by the negligence of the defendant's chauffeur and whether plaintiff's chauffeur was guilty of contributory negligence were properly left to the jury and that the finding in favor of the plaintiff should not be disturbed.

2. AUTOMOBILES AND GARAGES, § 3*—*when defenses that plaintiff was operating car without license and at unlawful speed are unavailable.* In an action to recover damages for injury to an automobile in a collision between automobiles owned by the respective parties, where the defendant charged that the chauffeur driving plaintiff's car had no license, and also that such car moved across a boulevard at a higher rate of speed than permitted by statute, *held* that as neither the running of the car without a license nor the operation at a rate of speed in excess of the statutory limit was shown to have had any causal connection with the accident, such defenses were unavailable.

3. NEGLIGENCE, § 8*—*when violation of statute or ordinance is material.* The violation of an ordinance or statute is not ordinarily negligence *per se* but only one of the elements to be considered, and in any event such violation, to be material, must be shown to have had a causal connection with the accident.

4. WITNESSES, § 278*—*what is proper mode of impeachment.* Permitting an impeaching witness to testify from a transcript of his stenographic notes is a proper mode of impeachment.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Sterne & Maley Company, Appellee, v. Tom Chamales,
Appellant.**

Gen. No. 22,794. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. CHARLES N. GOODNOW, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917. Rehearing denied April 30, 1917.

Statement of the Case.

Action by Sterne & Maley Company, a corporation, plaintiff, against Tom Chamales, defendant, to enforce the individual liability of defendant, as officer of a corporation, for debts contracted in the name of the corporation. From a judgment for plaintiff for \$558.79, defendant appeals.

WILLIAM R. BRAND, for appellant.

FRANK N. HILLIS, MARTIN WALSH and GUY M. BLAKE, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

CORPORATIONS, § 307—when officer liable for debts made in name of corporation.* In a suit to enforce the liability of an officer of a corporation under section 18 of the Corporation Act (J. & A. § 2435), providing that if any person pretending to be an officer shall assume to exercise corporate powers before compliance with the act, and before all stock shall have been subscribed in good faith, he shall be liable for debts made by him in the name of the corporation, where it appeared that it was proposed to form a corporation, and that the defendant subscribed for stock and was elected vice presi-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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dent and personally participated in the business and contracted obligations, and that a charter was issued but was not filed for record until after the delivery of the merchandise in question, *held* that the case was within said section 18, and that a judgment in favor of plaintiff was proper.

Aloizy Roszek, by Frank Roszek, Appellee, v. Bauerle & Stark Company, Appellant.

Gen. No. 22,801.

1. WORKMEN'S COMPENSATION ACT, § 4*—*when is minor legally permitted to work.* In a personal injury case brought on behalf of a minor, who was fifteen years old at the time of being injured, while operating a sandpaper machine in the factory of the defendant, where the defendant filed a special plea alleging that both parties were under the Workmen's Compensation Act of 1913, and a demurrer was sustained and the defendant elected to stand by the plea, section 1 of the Children's Employment Act of 1897 (J. & A. ¶ 5307), prohibiting children under fourteen to work in factories, and section 11 of the Act of 1903 of the Child Labor Act (J. & A. ¶ 5317), prohibiting children under sixteen from operating certain specified machines, including sandpaper machines, considered in connection with section 5 of the Workmen's Compensation Act [Cal. Ill. St. Supp. 1916, ¶ 5475(5)], defining as employees "minors who are legally permitted to work under the laws of this State," and *held* that under such statutes, and applying the words of the Compensation Act literally, plaintiff was "legally permitted to work" in the defendant's factory, and that as both plaintiff and defendant were under the Workmen's Compensation Act of 1913, the trial court did not have jurisdiction.

2. WORKMEN'S COMPENSATION ACT, § 1*—*what is purpose of.* It is contrary to the spirit of the Workmen's Compensation Act to relate the amount of compensation to the precise act which occasioned the injury, as the purpose of the act does not rest on the theory of negligence, but on the theory that the injuries to workmen and deaths caused by accidents in any business should be regarded as

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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a part of the expense of the business and should be borne by such business.

3. WORKMEN'S COMPENSATION ACT, § 4*—*when minor is legally permitted to work.* A minor aged fifteen years, who was injured while working at a sandpaper machine in a factory, which was forbidden him under section 11 of the Act of July 1, 1903, of the Child Labor Act (J. & A. ¶ 5317), *held* to nevertheless have been "legally permitted to work" under section 5 of the Workmen's Compensation Act of 1913 [Cal. Ill. St. Supp. 1916, ¶ 5475(5)], and to have been thus under the act, although injured through a violation of the statute.

4. WORKMEN'S COMPENSATION ACT, § 4*—*what minors are legally permitted to do work.* Section 5 of the Workmen's Compensation Act of 1913 [Cal. Ill. St. Supp. 1916, ¶ 5475(5)], defining as employees "minors who are legally permitted to do work under the laws of this State," construed and *held* that in the absence of restrictive words conditioning the work of minors to that special kind permitted to them, eligible minors doing any kind of work in a lawful place of employment were included.

5. WORKMEN'S COMPENSATION ACT, § 4*—*when contention that no contract of employment exists for application of act is untenable.* In an action in tort in behalf of a minor fifteen years old who was injured while at work on a sandpaper machine, which was contrary to section 11 of the Child Labor Act of 1903 (J. & A. ¶ 5317), where a special plea was filed alleging that such minor was under the Workmen's Compensation Act, and plaintiff contended that, as section 1 of the Compensation Act [Cal. Ill. St. Supp. 1916, ¶ 5475(1)] provided that every employee "as a part of his contract of hiring" should be deemed to have accepted the provisions of the act and to be bound thereby, the plaintiff's work being unlawful, could not have been the subject of a lawful contract of hiring, and that therefore there was no contract and the act did not apply, *held* that such contention was untenable.

DEVER, J., dissenting.

ON PETITION FOR REHEARING.

APPEAL AND ERROR, § 1157*—*when argument in petition for rehearing is improper.* Argument of points for the first time in a petition for rehearing is in violation of the rules relating to such petitions.

Appeal from the Superior Court of Cook county; the Hon. H. STERLING POMEROY, Judge, presiding. Heard in this court at the October term, 1916. Reversed. Opinion filed April 16, 1917. Re-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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hearing denied April 30, 1917. Supplemental opinion on petition for rehearing filed May 1, 1917.

FYFFE, RYNER & DALE, for appellant.

DAVID K. TONE and F. A. ROCKHOLD, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Plaintiff, a minor, while employed by defendant was injured. He brought a common-law action in tort, and upon trial had a verdict and judgment for \$3,000, from which defendant appeals.

The declaration avers that at the time of the injury plaintiff was under sixteen years of age, to wit, fifteen years old, and was operating, by defendant's permission or direction, a sandpaper machine, in violation of the Child Labor laws of this State, which caused the injury. Defendant pleaded the general issue and specially that both parties were under the Workmen's Compensation Act of 1913. A demurrer to this special plea was sustained, and defendant elected to stand by its special plea.

If the parties were under the Compensation Act, this judgment cannot be sustained, for the trial court had no jurisdiction. If the parties are not within the act, the demurrer to the special plea was rightly sustained and the case was tried in the proper forum. A majority of this court is of the opinion that the parties were under the Compensation Act, and consequently the judgment cannot stand.

That the defendant is one of the class of employers included in the act is not in question.

By section 1 of the Act relating to the employment of children, in force July 1, 1897 (J. & A. ¶ 5307), no child under the age of fourteen years shall be employed in any manufacturing establishment or factory.

By section 11 of the Act of July 1, 1903, of the Child Labor Act (J. & A. ¶ 5317), the employment of children under the age of sixteen years to operate certain specified dangerous machinery is expressly forbidden. One of such machines mentioned in the act is a sandpaper machine. Both statutes prohibit the employment of any child under the age of fourteen years in such a factory as was operated by the defendant; and under both statutes it was lawful for the plaintiff, fifteen years of age, to be employed in such a factory, but not to work at the sandpaper machine. Under section 5 of the Workmen's Compensation Act [Cal. Ill. St. Supp. 1916, ¶ 5475(5)], among the persons defined as employees are "minors who are legally permitted to work under the laws of the State." Under the above statutes, and applying the words of the Compensation Act literally, plaintiff was "legally permitted to work" in defendant's factory.

It is argued that because at the time of the accident plaintiff was working at a machine which was forbidden to him by the statute, he was not a minor "legally permitted to work under the laws of the State." It is said that any other construction would open the door to violations of the statutes designed to safeguard children of any age in employment, and it is suggested in this connection that some employments, for instance farming, are open to children under fourteen years of age. It is not necessary for us to determine now whether this clause includes children under fourteen years of age. It is possible to discern a substantial distinction between the status of children wholly forbidden employment in a factory or similar place and those permitted to work in such places. It is difficult to see any substantial distinction between the status of eligible minors and of adults; both may lawfully work in a factory; both may not work at certain machines; adults may not work at machines con-

structed and operated contrary to the various safety regulations of the State; minors may not work at certain specified machines; the underlying purpose in both cases being safety. The status of employment is the same in both cases; the difference lies only in the details of the regulations for safety. We have laws relating to the guarding of dangerous machines, factories, hours of labor, occupational diseases, comfort and safety of employees. An adult employee injured through the violation of any of these regulations is still under the Compensation Act. By parity of reasoning a minor permitted to work in the same factory is under the act although injured through a violation of statute.

We are of the opinion that it is contrary to the spirit of the Workmen's Compensation Act to relate the amount of compensation to the precise act which occasioned the injury. The purpose of the act is to compensate for personal injuries speedily and economically, unrelated to any negligence or omission of legal duty, such compensation to be considered as part of the cost of production. "The Workmen's Compensation Act is an entire departure from the common law in regard to the relation of master and servant. It does not rest on the theory of negligence, but on the theory that the injuries to workmen and deaths caused by accidents in any business should be regarded as a part of the expense of the business and should be borne by the business." *Keeran v. Peoria, B. & C. Traction Co.*, 277 Ill. 413, 420.

We believe this was the manifest intention of the Legislature with reference to eligible minors. If it had been otherwise, it would have been very easy to have added after the words, "legally permitted to work under the laws of the State," restrictive words conditioning the work of minors to that special kind permitted to them. That this was not done impels to

the conclusion that the words were used with the intention to include minors in a lawful place of employment doing any kind of work.

In section 1 of the Workmen's Compensation Act of 1913 [Cal. Ill. St. Supp. 1916, ¶ 5475(1)] it is provided that every employee "as a part of his contract of hiring * * * shall be deemed to have accepted all the provisions of this Act and shall be bound thereby." It is plausibly argued that as it was unlawful for plaintiff to work at a sandpaper machine, such work could not be the subject of a lawful contract of hiring; hence there is no contract and the act does not apply. But this might be said of any employment of minor or adult who works for an employer who fails to comply with the legal safety regulations in his place of business. This contention is aimed at the effectiveness of the Compensation Act, and if sustained would render it useless. We think this contention goes too far. If there is no contract, then the mutual duties between master and servant disappear, and employees would be unprotected either under the Compensation Act or at common law. Violation of law is no part of the contract of employment. The contract is for personal services at agreed wages, subject to the laws of the land.

The entire argument for plaintiff seems to be based upon a promise which, if established, would work great hardship to employees generally; logically pursued it would lead to the avoidance of the obligations of the Compensation Act by employers wherever there was noncompliance with the safety regulations imposed by statute, and we would have again with us the troublesome and unfair puzzles of assumed risk, contributory negligence, fellow-servant, and the like.

The only reported case, in point, of which we know is *Foth v. Macomber & Whyte Rope Co.*, 161 Wis. 549, in which the court construed these words we have been

Roszek v. Bauerle & Stark Co., 205 Ill. App. 276.

considering, which are identical in the Wisconsin Compensation Act and ours. The reasoning in that opinion seems to us to be convincing and has influenced our conclusion. Counsel for plaintiff has not successfully distinguished that case from the case before us. The suggestion that the Illinois and Wisconsin laws differ with respect to eligibility of all minors for some work—to wit, agriculture—is based on error. The law is the same in both States, as appears in the additional opinion filed in the *Foth* case, in disposing of a petition for rehearing. The very point presented by counsel in this connection is there given attention. Referring to the words in question, the opinion says: “The office of this clause * * * is to constitute a reference by which the conditions and restrictions of the laws of the State relating to the employment of minors are intended to be incorporated in this act.” We are in accord with this construction.

We hold that plaintiff and defendant here were under the Workmen’s Compensation Act of 1913, and that the trial court did not have jurisdiction.

The judgment of the Superior Court is reversed.

Reversed.

MR. JUSTICE DEVER dissents.

SUPPLEMENTAL OPINION BY MR. JUSTICE MCSURELY,
UPON PETITION FOR REHEARING.

A petition for rehearing has been filed on behalf of plaintiff, which consists almost entirely of argument of points not heretofore presented for our consideration. This is in violation of the rules of this court.

However, our attention is now for the first time called to two cases bearing upon the question involved. The first of these is *Stetz v. F. Mayer Boot & Shoe Co.*, 163 Wis. 151. We think this case can be distinguished from the case before us in this, that in that case it appears the contract of employment was unlawful *ab initio*. This is not true of the case at bar; here the boy

Richert v. Village of Niles, 205 Ill. App. 283.

was originally employed in the "repairing room oiling sticks," which is not prohibited work to a boy of his age. We are inclined to think that counsel has departed from the theory of his case as presented to us in his original brief and argument, and is attempting in his petition for rehearing to recast this theory into the form passed upon in the *Stetz* case, *supra*.

The other case is *Lostutter v. Brown Shoe Co.*, Gen. No. 6317, 203 Ill. App. 517. We are in accord with the statement of the dissenting opinion that the question of the repeal of our Child Labor Act is not involved.

While the opinions in these cases do not dissuade us from our opinion heretofore expressed, they emphasize the importance of having a final determination of the question involved by our Supreme Court; and to secure this we are ready to give assistance in any feasible way which may be suggested to us.

Petition for rehearing denied.

Anna Richert, Administratrix, Appellee, v. Village of Niles, Appellant.

Gen. No. 22,805. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by Anna Richert, administratrix of the estate of Albert Richert, deceased, plaintiff, against the Village of Niles, defendant, to recover for the death of Albert Richert, alleged to have been due to the negli-

Richert v. Village of Niles, 205 Ill. App. 283.

gence of defendant in knowingly permitting a certain public highway to be in an unsafe condition of repair so that it was not safe for public travel. From a judgment for plaintiff, defendant appeals.

THEODORE A. KOLB, for appellant; FRANCIS X. BUSCH, of counsel.

IRWIN B. HAZEN and LE ROY V. PENWELL, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL CORPORATIONS, § 1098*—*when evidence sufficient to show that boy did not jump off wagon.* In an action against a village to recover for the death of a boy fifteen years old caused by being thrown from a wagon which was being driven by another person along a public road on a dark night, where the front wheel of the wagon went down into a hole up to the axle, followed by the hind wheel, and it was claimed that the boy jumped off, and no one saw him the instant he went off the wagon, but the driver of the wagon stated that he saw a lantern which the boy held fall down in front of the wagon and go out, and that the boy apparently fell off the seat, and stopped his team and got down and found the boy lying on the street in an apparently lifeless condition, evidence held sufficient to show that the boy was thrown off or fell off the wagon, and that he did not jump off it.

2. MUNICIPAL CORPORATIONS, § 1098*—*when evidence sufficient to show negligence in allowing hole to exist in road.* In an action against a village, to recover for the death of a boy caused by his being thrown from a wagon as the result of the wheels going down into a hole in a public road on a dark night, held that testimony showing that such hole had been in the street for about a month, and that accidents had happened at the same hole before the accident in question, constituted sufficient proof of negligence.

3. MUNICIPAL CORPORATIONS, § 1089*—*what evidence admissible to show condition of road after accident.* Where, in an action against a village to recover for the death of a boy caused by his being

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Billos et al. v. Kozlowski, 205 Ill. App. 285.

thrown from a wagon as the result of the wheels going down into a hole in a public road on a dark night, the defendant claimed that it was error to permit evidence as to the filling up of the hole very shortly after the accident, and where it appeared that the witnesses who gave such testimony had been sent for the purpose of filling the hole, and had testified as to its location and size, held that such evidence was proper to prove conditions immediately or shortly after the accident in question.

**William Billos and George Thanos, Appellees, v.
Joseph F. Kozlowski, Appellant.**

Gen. No. 22,812. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOHN J. SULLIVAN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by William Billos and George Thanos, plaintiffs, against Joseph T. Kozlowski, defendant, to recover money deposited as security for the payment of rent. From a judgment for \$853.28 in favor of plaintiffs, defendant appeals.

BEACH & BEACH, for appellant; PAUL C. SCHUSSMAN, of counsel.

W. A. MORROW, for appellees.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. DAMAGES, § 85*—when money deposited by tenant as security for rent not treated as liquidated damages. In an action to recover

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Margolis v. Chicago Railways Co., 205 Ill. App. 286.

money deposited under a lease to secure the payment of rent, where the plaintiffs had been dispossessed under a judgment for possession, and the rent of one month amounting only to one-eighth of the deposit, was involved, and the issue was whether the defendant was entitled to retain the entire deposit as liquidated damages, *held* that to compel the forfeiture of the entire amount of the deposit for the nonpayment of a month's rent would be unconscionable.

2. DAMAGES, § 85*—*what is nature of money deposited by tenant as security for rent.* Money deposited by a tenant as security for rent will, as a rule, be regarded as a penalty merely and not as liquidated damages, and it is immaterial whether the deposit is called a penalty or liquidated damages, and particularly so when the deposit is out of all proportion to the rent due.

3. DAMAGES, § 85*—*what is important in determining whether deposit is penalty or otherwise.* The element of reasonableness is an important factor in determining whether or not a deposit should be considered as a penalty or otherwise, and if the forfeiture would be unreasonable, the entire deposit should not be applied as liquidated damages.

Mrs. A. Margolis, Appellee, v. Chicago Railways Company, Appellant.

Gen. No. 22,816. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. DENNIS W. SULLIVAN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by Mrs. A. Margolis, plaintiff, against the Chicago Railways Company, defendant, to recover damages for injuries to plaintiff's automobile due to a collision with defendant's street car. From a judgment for plaintiff for \$340.15, defendant appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

WILLIAM H. SYMMES and FRANK L. KRIETE, for appellant; J. R. GUILLIAMS and C. C. CUNNINGHAM, of counsel.

GEORGE D. WELLINGTON and ERNEST W. CLARK, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. STREET RAILROADS, § 131*—*when evidence is sufficient to sustain judgment for plaintiff in action for injuries to automobile.* In an action against a street car company to recover damages for injuries to plaintiff's automobile, where the trial was by the court, and it appeared that as the automobile which was being driven south, came to an east and west street and before starting to turn, the driver stopped the car, and, in looking south, saw a northbound car standing in front of the car barns about half a block away and passengers getting on and off, and that she then started to turn east and when the car was partially upon the northbound track she reversed and started back towards the west, and that just then the car struck the front end of the automobile, *held* that a judgment in favor of the plaintiff was not manifestly against the weight of the evidence.

2. STREET RAILROADS, § 97*—*when driver of automobile is not negligent in turning at street intersection in front of street car.* In an action against a street car company to recover damages for injuries to plaintiff's automobile, where the trial was by the court, and it appeared that as the automobile which was being driven south came to an east and west street, and, before starting to turn, the driver stopped the car, and, in looking south, saw a northbound car standing in front of the car barns about half a block away and passengers getting on and off, and that she then started to turn east, and when the car was partially upon the northbound track she reversed and started back towards the west, and that just then the car struck the front end of the automobile, *held* that the trial court could properly conclude that, as the automobile was first at the street intersection, the motorman of the street car should have given the driver time to pass, and that she was justified in proceeding to make the turn without paying further attention to the street car.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Feldman v. Chicago Railways Co., 205 Ill. App. 288.

Bessie Feldman, Appellee, v. Chicago Railways Company, Appellant.

Gen. No. 22,825. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by Bessie Feldman, plaintiff, against the Chicago Railways Company, defendant, to recover damages for personal injuries received while alighting from one of defendant's street cars and due to the sudden starting of the car. From a judgment for plaintiff for \$2,000, defendant appeals.

WATSON J. FERRY, for appellant; W. W. GURLEY, J. R. GULLIAMS, JOSEPH D. RYAN and FRANK L. KRIETE, of counsel.

WILLIAM CULLEN BURNS, for appellee; A. H. RANES, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. CARRIERS, § 476*—*when evidence sufficient to show injury of alighting passenger by sudden starting of car.* In an action for personal injuries sustained by plaintiff while alighting from the defendant's street car, where plaintiff claimed to have been injured by the sudden starting of the car while she was in the act of alighting, and her uncontradicted testimony was corroborated by her son and another witness, *held* that, while there might have been inconsistencies in the plaintiff's story of more or less importance, the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Pennsylvania Co. et al. v. Erie R. Co., 205 Ill. App. 289.

jury could properly conclude that in its essentials it was sufficient to support the charges of negligence in the declaration.

2. **APPEAL AND ERROR, § 1248***—*when counsel may not complain of conduct of court in administering rebuke.* Where, in the argument of a personal injury case, the defendant's attorney persisted in bringing before the jury material matter which was not strictly part of the evidence, and which the court ruled out, and then, upon counsel persisting, was rebuked by the court, *held* that as the action of the court was invoked by the improper conduct of counsel, the defendant could not be heard to complain on appeal.

3. **DAMAGES, § 114***—*when verdict for injuries to woman is not excessive.* A verdict for \$2,000 *held* not excessive, where a woman nine weeks pregnant, who was thrown while alighting from a street car, received injuries to her leg, stayed in bed about ten days, then suffered a miscarriage, was in bed three weeks thereafter, was for some time attended every day by her physician, also suffered considerable pain, was apparently in good health before the accident, was sick during the succeeding summer and has suffered pain in her side since then.

Pennsylvania Company and Chicago & Alton Railroad Company, Appellees, v. Erie Railroad Company, Appellant.

Gen. No. 22,830. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917. Rehearing denied April 30, 1917.

Statement of the Case.

Action by the Pennsylvania Company, a corporation, and the Chicago & Alton Railroad Company, a corporation, plaintiffs, against the Erie Railroad Company, a corporation, defendant, to recover dam-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Pennsylvania Co. et al. v. Erie R. Co., 205 Ill. App. 289.

ages for injury to a caisson sunk by plaintiffs in connection with the construction of a bridge and struck by defendant's steamer while navigating in the Chicago River. From a judgment for plaintiffs for \$11,500, defendant appeals.

W. O. JOHNSON and BULL & JOHNSON, for appellant;
ROBERT J. FOLONIE and GEORGE C. GALE, of counsel.

LOESCH, SCOFIELD, LOESCH & RICHARDS and WINSTON, PAYNE, STRAWN & SHAW, for appellees; SILAS H. STRAWN, JAMES STILLWELL and WALTER H. JACOBS, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. COLLISION, § 4^a—*when negligent management of steamer is sole cause of injury to caisson.* In an action for damages for injury to a caisson through its being struck by a steamer of the defendant which was being navigated in the daytime in a navigable river, where it appeared that such caisson had been sunk by the plaintiffs in connection with the construction of a new railroad bridge, and that it was twenty-eight feet long by sixteen feet wide, and projected four feet above the water, and closed the south draw of the old bridge so that vessels could use only the north draw, which facts were known to the captain of the steamer and to the captain of the tug having the same in tow, and, in approaching the bridge, which was swung to let the steamer pass, the latter should have retarded its speed in order to get through the proper draw, but instead went ahead at full speed, *held* that the sole cause of the accident was the negligent management of the steamer, unaffected either by the conduct of the captain of the tug or those in charge of the bridge.

2. COLLISION—*when lack of permit for bridge and caisson is not defense to action for injury to caisson.* In an action for damages for injury to a caisson through its being struck by a steamer of the defendant which was being navigated in the day-

^aSee Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

time in a navigable river, where it appeared that such caisson had been sunk by the plaintiffs in connection with the construction of a new railroad bridge, and that it was twenty-eight feet long by sixteen feet wide, and projected four feet above the water, and closed the south draw of the old bridge so that vessels could use only the north draw, which facts were known to the captain of the steamer and to the captain of the tug having the same in tow, and, in approaching the bridge, which was swung to let the steamer pass, the latter should have retarded its speed in order to get through the proper draw, but instead went ahead at full speed, and defendant contended that the lack of a city permit for the bridge and caisson constituted a defense, *held* that, as the negligent management of the steamer was the sole cause of the accident, the lack of a permit had no causal connection whatever with the occurrence and was therefore not a defense to the suit.

3. COLLISION—*when exclusion of ordinances is not erroneous.* The exclusion of city ordinances in an action for damages for injury to a caisson through its being struck by a steamer is not error where the violation of such ordinances had no causal connection with the occurrence in question.

Advance Terra Cotta Company, Appellant, v. R. Watson Cross, Appellee.

Gen. No. 22,833. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Bill of interpleader by the Advance Terra Cotta Company, complainant, against Henry B. Prosser and R. Watson Cross, rival claimants for certain shares of stock of complainant corporation, defendants. From a judgment that the stock belonged to defendant Cross, dismissing the bill for want of equity, and for costs amounting to \$278.75 against complainant in favor of defendant Cross, complainant appeals.

Advance Terra Cotta Co. v. Cross, 205 Ill. App. 291.

BUELL & ABBEY, for appellant.

EDWIN L. WAUGH, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. INTERPLEADER, § 19*—*when costs properly assessed against complainant.* On a bill of interpleader, where the bill alleged that the defendant and another party were rival claimants for certain shares of stock of the complainant corporation, and it was held that the stock belonged to the defendant, and the bill was dismissed for want of equity and the costs assessed against complainant, *held* that, as the bill was not brought in good faith, the costs were properly assessed against the complainant.

2. INTERPLEADER, § 19*—*when complainant acting collusively or in bad faith is liable for costs.* Costs on a bill of interpleader are as a general rule eventually taxed against the person who made the false claim and made the proceeding necessary, but where the complainant acts collusively or in bad faith, the costs of the successful claimant may be taxed against him in both the trial and Appellate Courts.

3. INTERPLEADER, § 2*—*when bill of does not lie in favor of corporation.* Where a bill of interpleader filed by a corporation alleged that one of the defendants and a certain other party were rival claimants for certain shares of the stock of the company, and it appeared that the president and agent of complainant made an agreement with such defendant to the effect that upon the performance of certain services he would be given as consideration certain shares of stock, and such services were performed by such defendant and the stock was issued, and such stock was the property in controversy, and such president was the other rival claimant, *held* that such president had no rightful claim to the stock, and that whatever controversy there was, lay wholly between complainant and such defendant, and that therefore there was no occasion for a bill of interpleader.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Anna E. Bastle, Administratrix, Defendant in Error,
v. Chicago, Rock Island & Pacific Railway Com-
pany, Plaintiff in Error.**

Gen. No. 22,837. (Not to be reported in full.)

Error to the Superior Court of Cook county; the Hon. MARCUS A. KAVANAGH, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by Anna E. Bastle, administratrix of the estate of John A. Bastle, deceased, against the Chicago, Rock Island & Pacific Railway Company, defendant, to recover for the death of said John A. Bastle, alleged to be due to the sudden starting of a car on a team track from which deceased, as the agent of the consignee, was engaged in inspecting merchandise. From a judgment for plaintiff for \$8,000, defendant brings error.

M. L. BELL and A. B. ENOCH, for plaintiff in error.

JAMES C. McSHANE, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. **WORKMEN'S COMPENSATION ACT, § 12***—*when motion in arrest of judgment in action for death is properly denied.* In an action against a railroad company for death caused by the sudden movement of a car of the defendant while the deceased was inspecting the contents of such car as an employee of the consignee, while such car was on one of the team tracks of the defendant, where the defendant filed a special plea setting up that its occupation and

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Bastle v. C., R. I. & P. Ry. Co., 205 Ill. App. 293.

that of the deceased's employer came within the occupation specified in section 3 of the Workmen's Compensation Act [Cal. Ill. St. Supp. 1916, ¶ 5475(3)], and claimed that its motion in arrest should have been sustained, as the declaration failed to state a cause of action under such act, *held* that the motion was properly denied, as the declaration made no reference to the act, and plaintiff was not seeking to recover except in the common-law action of tort.

2. WORKMEN'S COMPENSATION ACT, § 3*—*when employer is not under*. In an action against a railroad company for death caused by the sudden movement of a car on a team track of the defendant while the deceased was inspecting the contents of such car as an employee of the consignee, *held* that as the deceased's employer was engaged in the egg brokerage business, and as neither such employer nor the deceased had anything to do with the unloading or hauling of any eggs at any time, and no action had ever been taken by the employer towards accepting or rejecting the Compensation Act, such employer did not come within the act.

3. WORKMEN'S COMPENSATION ACT, § 3*—*when employer is not engaged in occupation, enterprise or business within statute*. In an action against a railroad company for death caused by the sudden movement of a car on a team track of the defendant while the deceased was inspecting the contents of such car as an employee of the consignee, where it was contended that the case was within the Workmen's Compensation Act of 1913, because the employer of the deceased was one of the kinds of employers enumerated in section 3 of the Act [Cal. Ill. St. Supp. 1916, ¶ 5475(3)], which, under the terms of the act, should be conclusively presumed to have elected to be under such act, and where it appeared that such employer was engaged in the egg brokerage business and had nothing to do with the unloading or hauling of any eggs at any time, *held* that the only occupation which it could possibly be claimed affected such employer was that described as "carriage by land and water and loading or unloading in connection therewith," and that any teaming which such employer hired to be done for it could not be its "occupation, enterprise or business" within the meaning of the statute.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

William J. Jenson et al., trading as Regelin, Jenson & Company, Appellants, v. Olivia Nelson, Appellee.

Gen. No. 22,840. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. R. J. CARNAHAN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by William J. Jenson, Max L. Wolff and Elbert N. Manning, copartners, trading as Regelin, Jenson & Company, plaintiffs, against Olivia Nelson, defendant, to recover for a balance claimed to be due from defendant, including a sum for commissions for the sale of real estate. From a judgment for \$132.89 in favor of defendant on her set-off, plaintiffs appeal.

ADLER, LEDEBER & BECK, for appellants.

DANIEL M. HEALY, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. **BROKERS, § 36***—*when broker fails to procure proper customer.* In an action by real estate brokers to recover commissions, where it appeared that defendant had by written contract given plaintiffs the exclusive agency of the premises for a period of three months at a certain sum, "or at such a less price as we may conclude to accept," and a customer with an offer of a lesser sum was procured but plaintiffs were informed that such offer was not acceptable, and it also appeared that a contract for such lesser amount was drawn up and given to the husband of the defendant, but defendant did not understand until the contract was examined at her home

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Jenson v. Nelson, 205 Ill. App. 295.

that it was for the lesser price, and, upon inquiry as to why the contract was not signed, plaintiffs were informed that it should have been for a larger sum and that no contract would be signed until defendant had closed up another deal upon another piece of property, *held* that plaintiffs had failed to procure a customer which the defendant was obliged to accept, and that under the terms of the contract she was not obliged to accept any customer except at the larger figure.

2. BROKERS, § 84*—*when admission of testimony as to another deal is not prejudicial error.* In an action by real estate brokers to recover commissions, where it appeared that defendant had by written contract given plaintiffs the exclusive agency of the premises for a period of three months at a certain sum, "or at such a less price as we may conclude to accept," and a customer with an offer of a lesser sum was procured but plaintiffs were informed that such offer was not acceptable, and a contract for such amount was drawn up and given to the husband of the defendant, but defendant did not understand until the contract was examined at her home that it was for the lesser price, and, upon inquiry as to why the contract was not signed, plaintiffs were informed that it should have been for a larger sum, and that no contract would be signed until defendant had closed another deal upon another piece of property, *held* that testimony as to the other deal was not parol evidence tending to change the written contract and that the admission of such evidence was not prejudicial error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**John Schultz for use of R. J. Whitlock, Appellee, v.
Home Insurance Company of New York, Appel-
lant.**

Gen. No. 22,844. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOHN R. NEWCOMER, Judge, presiding. Heard in this court at the October term, 1916. Reversed and judgment here. Opinion filed April 16, 1917.

Statement of the Case.

Action by John Schultz for the use of R. J. Whitlock, plaintiff, against the Home Insurance Company of New York, defendant, to recover on a policy of fire insurance issued to said Schultz on a building being constructed for him, and assigned by said Schultz to said R. J. Whitlock, an agent of another insurance company which settled for the loss under a policy in favor of the contractor with the latter. From a judgment for plaintiff for \$798.50, defendant appeals.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for appellant; CLYDE E. SHOREY and FRED BARTH, of counsel.

BROTHERS & FAIRFIELD, for appellee; FRANK M. FAIRFIELD, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 86*—*what is nature of contract of fire insurance.* A contract for fire insurance is a contract of indemnity, and the insured is not entitled to compensation when he has suffered no loss or damage.

2. INSURANCE—*when owner is not entitled to compensation for loss of building during course of construction.* In an action by

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Fritz v. Chicago Railways Co., 205 Ill. App. 298.

the owner of a building to recover on a fire insurance policy issued upon a building in course of construction, where the owner took out insurance with defendant, and the contractor also insured the building in his own name but with another company, and a fire occurred before the completion of the building, and the appraisers for the company who had insured the building for the contractor appraised the damage, and paid the amount to the contractor, and at the same time plaintiff assigned his policy to the party for whose use the suit in question was brought, he being the agent of the company who insured the building in favor of the contractor, and the contractor repaired the damage caused by the fire and used therefor nearly all of the money received under his policy, and, upon completion of the building, the full contract price was paid to the contractor, and the owner suffered no loss through the fire and made no claim under his policy, *held* that the insured was not entitled to compensation, as he had suffered no loss or damage.

**Albert Fritz, Appellant, v. Chicago Railways Company,
Appellee.**

Gen. No. 22,849. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by Albert Fritz, plaintiff, against the Chicago Railways Company, defendant, to recover damages for injuries sustained in a collision between an automobile in which he was riding and one of defendant's street cars. From a judgment for \$300 in his favor, plaintiff appeals.

LITZINGER, MCGURN & REID, for appellant.

FRANK L. KRIETE, for appellee; J. R. GUILLIAMS and JOSEPH D. RYAN, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 892***—*when record not reviewed because of insufficiency of abstract.* Where the abstract of the record in a case failed to show that the bill of exceptions contained any motion for a new trial and the exhibits introduced by the defendant were merely described by numbers without giving any information as to their character, and such abstract gave what was designated as "an abstract of testimony," but failed to show how such testimony appeared in the record, and only one of ten instructions given for the plaintiff was shown, and the only reference to defendant's instructions were the words "twenty-three instructions given on behalf of the defendant pertaining to the question of liability," and such abstract also failed to show any certificate by the trial judge that the purported bill of exceptions was certified to by the judge, *held* that the pleadings before the Appellate Court did not justify a review of the record.

2. **APPEAL AND ERROR, § 842***—*who may certify to bill of exceptions.* A bill of exceptions must be certified to by the trial judge and the clerk of the court is without authority to give such certificate.

3. **APPEAL AND ERROR, § 892***—*what is effect of failure to file proper abstract.* The abstract of the record is the pleading of the party seeking to have such record reviewed, and it is the duty of such parties to prepare and file a complete abstract of the record in accordance with the rules, and such abstract as the reviewing court can safely rely upon, and, on a failure to comply with such rules, the reviewing court is not called upon to review the record.

4. **DAMAGES, § 242***—*when verdict for plaintiff not disturbed on ground of inadequacy of damages.* Where the preponderance of the evidence is in favor of the defendant, a verdict for the plaintiff will not be set aside simply upon the ground of the inadequacy of damages.

5. **APPEAL AND ERROR, § 1040***—*when assumed that assignments of error were inadvertently included in plaintiff's assignments.* In a case where the plaintiff appealed, and in several assignments of error assigned as error the refusal of the trial court to find the defendant not guilty, *held* that as assignments of error are in the nature of a declaration, and plaintiff was asserting that the trial court should have instructed the jury to bring in a verdict of not guilty, it was to be assumed that such assignments were inadvertently included in plaintiff's assignments.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Cleveland v. Eichengreen, 205 Ill. App. 300.

T. K. Cleveland, trading as Inter-State Produce Company, Appellee, v. M. H. Eichengreen, Appellant.

Gen. No. 22,853. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by T. K. Cleveland, trading as Inter-State Produce Company, plaintiff, against M. H. Eichengreen, defendant, to recover the amount of funds retained by defendant after the quashing of an attachment by a third person of funds owed plaintiff by defendant. From a judgment for plaintiff for \$911.60, defendant appeals.

This controversy arose out of the attachment action, a decision in which was reached in *Lepman & Heggie v. Inter-State Produce Co.*, ante, p. 270.

FRANK SCHOENFELD, for appellant.

HARFORD & LIGHTFOOT, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. GARNISHMENT—*when garnishee is not entitled to retain funds.* In an action to recover money which the defendant had retained pending the decision of an attachment action against the plaintiff, in which the defendant was garnished, where the attachment was quashed and an order was entered discharging the garnishee, and although a certified copy of such order was served on the defendant, and the money demanded, he refused to turn it over, and,

Donahue v. Wheeling Mold & Foundry Co., 205 Ill. App. 301.

after such refusal, a writ of error was sued out in the attachment action, but it did not appear that the defendant was ever made a party to the *supersedeas* or that he ever received formal notice thereof, or that the writ was filed in the Municipal Court clerk's office, and defendant claimed that as the suit in question was begun after the said writ of error was sued out, the writ might be pleaded in abatement, *held* that, after the defendant had been discharged as garnishee and demand had been made upon him to return the money, he had no right to retain the funds in the expectation that the defeated party in the original case might sue out a writ of error.

2. GARNISHMENT—*when garnishee is not entitled to retain money pending writ of error.* A garnishee in an attachment action has no right after the attachment has been quashed, and an order discharging him as garnishee has been entered, to retain the money during the pendency of a writ of error where no *supersedeas* was allowed, and he was not a party to the writ of error, and no notice of its issuance had been served upon him, and the writ was never filed with the clerk of the court to which such writ issued.

3. APPEAL AND ERROR, § 710*—*what is effect of supersedeas.* A *supersedeas* suspends the efficacy of a judgment, but does not, like reversal, annul the judgment.

John A. Donahue, trading as John A. Donahue & Company, Appellant, v. Wheeling Mold & Foundry Company, Appellee.

Gen. No. 22,856. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. CHARLES N. GOODNOW, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded. Opinion filed April 16, 1917. Rehearing denied April 30, 1917.

Statement of the Case.

Action by John A. Donahue, trading as John A. Donahue & Company, plaintiff, against the Wheeling Mold & Foundry Company, defendant, to recover for breach of a contract for the sale of a road roller busi-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Donahue v. Wheeling Mold & Foundry Co., 205 Ill. App. 301.

ness. From a judgment for defendant for costs, plaintiff appeals.

CAMERON & MATSON, for appellant.

NINDE, POTTER & RIGBY, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 1101***—*what is effect of failure of appellee to file brief.* In the absence of a brief by the appellee, the Appellate Court will, under its rules, accept as true the statement of the case as it appears in the brief of the appellant.

2. **MUNICIPAL COURT OF CHICAGO, § 10***—*what is form of action of the fourth class.* In an action of the fourth class in the Municipal Court, the form of action is such as the evidence makes it.

3. **MUNICIPAL COURT OF CHICAGO, § 13a***—*what does not constitute variance between statement of claim and evidence in action for breach of contract.* In an action of the first class brought in the Municipal Court on a contract, where the plaintiff's statement of claim alleged a contract for the sale of a certain business, and asserted that he had performed his part of the contract and that the defendant had breached the undertaking, and it appeared on the trial that the plaintiff had not performed his undertaking in certain particulars, and plaintiff undertook by evidence to explain such nonperformance, and the trial court held that such evidence constituted a variance between the statement of claim and the proof and decided against plaintiff's claim, *held* that if nonperformance of some of the details of the undertaking was excusable or agreed upon between the parties, plaintiff was still entitled to recover whatever his damages might have been, and that the ruling against plaintiff on the ground of variance was error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Nellie Carlin, Administratrix, Appellee, v. Chicago Railways Company, Appellant.**Gen. No. 22,860. (Not to be reported in full.)**

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded. Opinion filed April 16, 1917.

Statement of the Case.

Action by Nellie Carlin, as administratrix of the estate of Philip Gurivitz, deceased, plaintiff, against the Chicago Railways Company, defendant, to recover for the death of said Philip Gurivitz due to his being struck by one of defendant's street cars. From a judgment for plaintiff for \$2,500, defendant appeals.

FRANK L. KRIETE, for appellant; W. W. GURLEY, J. R. GUILLIAMS and WEYMOUTH KIRKLAND, of counsel.

A. H. RANES and M. A. ZELENSKY, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. TRIAL, § 56*—*when essential that rulings on evidence be free from error.* Where a case is exceedingly close on the facts, it is necessary that the rulings on evidence should be virtually free from error.

2. INSTRUCTIONS, § 7*—*when correctness of essential.* It is necessary that instructions be free from error where a case is exceedingly close on the facts.

3. STREET RAILROADS, § 116*—*when evidence inadmissible as constituting expression of opinion.* In an action to recover for the death of a boy through his being struck by a street car of the defendant, where, against objection, a witness was permitted to tes-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Carlin v. Chicago Railways Co., 205 Ill. App. 303.

tify that the motorman, immediately after the accident, stated that "he was too nervous to stop the car so quick," *held* that such statement was merely an expression of opinion by the motorman as to a past event, and not part of the *res gestæ*, and its introduction constituted prejudicial error.

4. STREET RAILROADS, § 145*—*when instruction in action for death of child is erroneous.* In an action to recover for the death of a boy six years old through his being struck by a street car of the defendant, the giving of an instruction which was, in effect, a peremptory instruction to find for the plaintiff, and which excluded the element of the use of care on the part of the parents or next of kin of the deceased, *held* error.

5. STREET RAILROADS, § 140*—*when instruction in action for death of child is erroneous as not conforming to evidence.* In an action to recover for the death of a boy six years old through his being struck by a street car of the defendant, the giving of an instruction containing a supposition that "the mother was attending to her usual occupation in their home," *held* error, in the absence of evidence on that point.

6. STREET RAILROADS, § 145*—*when instruction in action for death of child as to negligence of parents is erroneous.* In an action to recover for the death of a boy six years old through his being struck by a street car of the defendant, the giving of an instruction containing a supposition that "the mother was attending to her usual occupation in their home," *held* open to the objection that it stated, as a matter of law, that if the father was not present at the time of the accident and the mother was attending to her usual occupation in her home, the parents were not negligent.

7. INSTRUCTIONS, § 63*—*when erroneous because of assumption of facts.* An instruction which assumes a fact as to which there is no evidence is erroneous.

8. INSTRUCTIONS, § 98*—*when instruction on interest of witnesses in result is erroneous.* In an action to recover for the death of a boy caused by his being struck by a street car, where the motorman was a very important witness and no witness having any interest in the result of the suit gave testimony, and instructions were given on behalf of plaintiff, which referred to the interest or lack of interest in the result of the case of witnesses testifying, *held* that such instructions were clearly directed at the employees of the defendant who did testify, with the suggestion that they had an interest in the result of the suit, whereas as a matter of law they did not have such interest, and that the giving of such instructions was prejudicial error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

9. **APPEAL AND ERROR, § 1560***—*when refusal of instruction is not reversible error.* It is not reversible error to refuse an instruction which, although it might have been given as a matter of precaution, was unnecessary under the evidence and pleading.

10. **STREET RAILROADS, § 91***—*necessity of parents giving attention to children playing in street.* It is not the law that, where families reside upon a street where there are street car tracks, no attention whatever need be given to children playing in the street.

Charles A. Nowak, Appellant, v. Clarence H. Geist, Appellee.

Gen. No. 22,707. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. THOMAS TAYLOR, JR., Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Bill by Charles A. Nowak, complainant, against Clarence H. Geist, defendant, for a partnership accounting. From a judgment in favor of complainant for \$912.50, complainant appeals.

ANGUS ROY SHANNON and CHAUNCEY M. MILLAR, for appellant.

WALTER L. FISHER and STEPHEN A. DAY, for appellee.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

1. **PARTNERSHIP, § 52***—*when evidence sufficient to show existence of.* On a bill for an accounting, where it was alleged that a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Nowak v. Geist, 205 Ill. App. 305.

copartnership existed between the parties for the purpose of securing, selling, financing and disposing of public utility franchises, evidence *held* sufficient to show that the parties, following the agreement in question, had transacted a partnership business as alleged.

2. PARTNERSHIP, § 61*—*when franchises deemed to be property of*. On a bill for a partnership accounting, where one of the questions to be determined was whether certain franchises were included in the partnership agreement of the parties, or whether they were to be regarded as the individual property of the defendant, *held* that when consideration was given to the time, manner and circumstances under which such franchises were acquired, it might reasonably be held that the acquirement of them inured to the benefit of the partnership.

3. PARTNERSHIP, § 337*—*when evidence sufficient to show dissolution of*. On a bill for a partnership accounting, where one of the main questions involved was whether or not the partners had agreed to dissolve as of a certain date and to permit the defendant to deal with a certain option contract free of the interest of the complainant, evidence *held* sufficient to show that the partnership was dissolved at the time in question.

4. PARTNERSHIP, § 422*—*when accounting not allowed beyond time of alleged dissolution*. On a bill for a partnership accounting, where one of the principal questions involved was whether the accounting should have been excluded beyond a certain date, or in any event beyond the date at which the bill alleged that a dissolution took place, and where it appeared that the bill sought a partnership accounting solely, and was not predicated on any fraudulent or deceitful conduct on the part of the defendant, *held* that although there was sufficient evidence to warrant a finding that such accounting should have been had as of the earlier date, it was clear that it should not have been extended beyond the date at which the bill alleged that a dissolution had taken place.

5. PARTNERSHIP, § 61*—*what not considered property of*. Property acquired after the dissolution of a partnership but before the affairs of the dissolved corporation have been wound up is not necessarily to be considered as partnership property, even though the partner acquiring it has continued to carry on the business of the dissolved firm without the consent of his late partners.

6. PARTNERSHIP, § 410*—*what is extent of liability of partner to copartners for property of in his possession*. Where a bill merely seeks a partnership accounting as between partners, each partner is deemed to be a debtor to the others to the extent of the partnership property under his possession or control at the time of the dissolution of the partnership.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Martin Curran, Appellee, v. Wells Brothers Company,
Appellant.**

Gen. No. 22,722. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. MARCUS A. KAVANAGH, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by Martin Curran, plaintiff, against Wells Brothers Company, a corporation, defendant, to recover damages for personal injuries sustained by a plank falling from a platform upon plaintiff while he was employed by defendant. From a judgment for plaintiff for \$3,000, defendant appeals.

BRUNDAGE, LANDON & HOLT, for appellant.

FRANCIS J. WOOLLEY, for appellee.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1672*—*when question of insufficiency of pleadings is waived.* In an action to recover damages for injuries sustained by an employee while in the employ of the defendant, where the defendant filed plea of the general issue and special plea setting up in defense that defendant had elected to pay compensation under the Workmen's Compensation Act, to which the plaintiff filed replication that defendant had not furnished to plaintiff or posted the required notices under that act, *held* that defendant had waived its right to present on review the question whether it was the duty of the plaintiff to allege in his declaration facts which would take both plaintiff and defendant out of the operation of the Workmen's Compensation Act, as the pleadings presented that issue

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Curran v. Wells Brothers Co., 205 Ill. 307.

and no objection was made by either party or a ruling made on the question by the court.

2. WORKMEN'S COMPENSATION ACT, § 12*—*when action is not brought under*. Where an action was brought to recover damages for injuries sustained by an employee while in the employ of the defendant, to which the defendant filed plea of the general issue and special plea setting up in defense that defendant had elected to pay compensation under the Workmen's Compensation Act, and the plaintiff filed replication that defendant had not furnished to plaintiff or posted the notice required by that act, *held* that such action was not brought under that act but under the common-law right of plaintiff.

3. WORKMEN'S COMPENSATION ACT, § 2*—*when evidence sufficient to show failure of employer to post notice of election to come under*. Evidence *held* sufficient to warrant the finding that defendant had not posted the notice required by the Workmen's Compensation Act of employers electing to pay compensation thereunder, in an action to recover damages for injuries sustained by an employee while in defendant's employ.

4. WORKMEN'S COMPENSATION ACT, § 2*—*when employee not bound by act*. Under the Workmen's Compensation Act of 1911, sec. 1, subsec. 3, ¶ "c" (J. & A. ¶ 5449), providing that where an employer elects to pay compensation under that act "every employee of such employer" shall also be bound by the act unless he shall within thirty days after his hiring file notice to the contrary with the secretary of the State Bureau of Labor Statistics, and containing the proviso "that before any such employee" shall be so bound the employer shall furnish to him or post a statement of the compensation provisions of the act, *held* that the words "such employee" used in the proviso related to and modified the words "every employee of such employer" used at the beginning of the paragraph, and by such proviso construed with the whole context of the paragraph the Legislature meant that an employee would not be bound by the act where the employer had not furnished a statement or posted notices as required by the proviso.

5. STATUTES—*when rule of reference to last antecedent not applied*. While the words "aforesaid," "said," "their" and "such" in a statute will generally be referred to the last antecedent, such rule will not be strictly applied where such application would result in destroying or materially altering the intention of the Legislature as expressed in the whole context of the language under consideration.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Edward J. Petterson, by Louis F. Petterson, Appellee,
v. Martha Gnatek, Appellant.**

Gen. No. 22,730. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. SAMUEL H. TAUBE, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917. Rehearing denied April 30, 1917.

Statement of the Case.

Action by Edward J. Petterson, a minor, by Louis F. Petterson, his next friend, plaintiff, against Martha Gnatek, defendant, to recover damages for injuries sustained by a fall from the rear porch at the second floor of a building owned by defendant. From a judgment for plaintiff for four hundred dollars, defendant appeals.

MAX KRAUSS, for appellant.

JONES & KERNER, for appellee.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

1. **LANDLORD AND TENANT, § 230***—*what constitutes a common way which landlord is under duty to repair.* Where a three-story tenement building was provided with rear porches on each story communicating with each other by stairways, which were the only means of ingress and egress from the rear for the second and third stories, *held* that the first and second porches should be regarded as a common way which it was the duty of the owner of the building to keep in a reasonably safe condition for such persons as might have a legal right to use the same.

2. **LANDLORD AND TENANT, § 230***—*when landlord liable for in-*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Petroyeanis v. Pirola, 205 Ill. App. 310.

juries due to nonrepair of common way. Where a three-story tenement building was provided with rear porches on each story connecting with each other by stairways and used as a common way by the tenants of the second and third stories, *held* that the fact that part of the second-story porch upon which the accident to the plaintiff occurred by reason of the defective condition of such porch a few feet away from the stair opening was in the exclusive control and possession of the tenant of the second story would not relieve the owner of the building from liability because of such defective condition, in an action by an occupant of the third story to recover damages for injuries sustained by reason of such condition.

3. LANDLORD AND TENANT, § 258*—*when evidence sufficient to show notice by landlord of defective condition of porch.* Evidence *held* sufficient to warrant the finding that defendant had notice of the defective condition of a certain plank in a porch, by reason of which plaintiff was injured, or by the exercise of reasonable care could have had such notice, in an action against a landlord to recover damages for such injuries.

**Stavros Petroyeanis, Appellant, v. A. B. Pirola et al.,
Appellees.**

Gen. No. 22,733. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Bill by Stavros Petroyeanis, complainant, against A. B. Pirola and others, defendants, in the nature of a creditor's bill to discover assets and apply same upon a certain judgment in favor of complainant against the A. B. Pirola Company, defendant, and Chicago Railways Company. From a decree dismissing the bill for want of equity, upon demurrer, complainant appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The bill alleged that on May 2, 1914, the complainant had recovered a judgment against the Chicago Railways Company and the A. B. Pirola Company for the sum of \$5,000; that the Chicago Railways Company prosecuted an appeal from this judgment to this court; that while the appeal was pending, on April 10, 1915, the complainant and the Chicago Railways Company entered into an agreement, which was entitled "Covenant not to sue." This agreement provided, in substance, that in consideration of the payment by the Chicago Railways Company to the complainant of the sum of \$3,000, the complainant agreed to take no action, either in law or equity, or to prosecute any writ of execution to obtain satisfaction of said judgment from the Chicago Railways Company, in any form or manner whatsoever; and in this instrument the complainant agreed to be forever precluded "from asserting any right against the said Chicago Railways Company he may have heretofore had to prosecute and collect his said claim for personal injuries to the undersigned against it." It was alleged in the bill that the \$3,000 referred to was received by the complainant; that an execution was issued upon the judgment and a demand made by the sheriff upon the A. B. Pirola Company for the amount of the judgment; that the execution was returned "no part satisfied"; that there is still due the complainant on said judgment the sum of \$2,000; and that the judgment was the result of an action brought by the complainant against the defendants because of an accident which resulted in injuries to him on January 11, 1912.

EMERY S. WALKER and CLYDE O. HORNBAKER, for appellant; ISRAEL COWEN, of counsel.

FRED W. MAYER, for appellees; ERNEST SEVERY, of counsel.

Petroeanis v. Pirola, 205 Ill. App. 310.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

1. RELEASE, § 21*—*what is effect of settlement of claim by one joint tortfeasor.* Where a claimant has a valid existing claim against several joint tortfeasors, any one of such joint tortfeasors may, by agreement with such claimant, purchase his peace without affecting the right of such claimant to bring an action against all of the others against whom such action may lie.

2. RELEASE, § 22*—*what is theory upon which "covenants not to sue" contracts have been held valid.* The theory upon which "covenants not to sue" contracts have been held valid is that there is existing a claim, the assertion of which might cause annoyance or expense to one of several against whom such claim is made.

3. RELEASE, § 22*—*what does not constitute covenant not to sue.* Where, pending an appeal from a judgment against two defendants in an action in tort, one of such defendants received from the plaintiff in such action, in consideration of a certain sum paid by such defendant, an agreement by the plaintiff to take no action in law or equity or prosecute any writ of execution on such judgment to obtain satisfaction thereof from such defendant, held that such agreement was not a "covenant not to sue" but was a release and payment of the judgment as against both defendants, notwithstanding such was not the intention of the parties as expressed in such agreement.

4. CONTRIBUTION, § 1*—*when right of does not exist.* There can be no contribution between joint tortfeasors.

5. RELEASE, § 21*—*when release of one joint tortfeasor inures to benefit of others.* A release of liability of one joint tortfeasor will inure to the benefit of the others, either before or after suit is brought and pending judgment or after judgment has been entered, where tortious conduct is made the basis of a claim or action.

6. CREDITORS' SUIT, § 48*—*what bill against one of two judgment debtors should show.* A creditor's bill filed against one of two judgment debtors in an action in tort should show affirmatively why the judgment was not or is not enforceable against both debtors.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Franzke v. Chicago Stock Yards & Transit Co., 205 Ill. App. 313.

August Franzke, Complainant, v. Chicago Stock Yards & Transit Company et al., Defendants.

John S. Level, Cross-Complainant, v. Chicago Stock Yards & Transit Company et al., Defendants.

Urban A. Lavery (Intervening Petitioner), Appellee, v. C. S. Bellamy (Defendant), Appellant.

Gen. No. 22,737. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. FREDERICK A. SMITH, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Bill by August Franzke, complainant, against the Chicago Stock Yards & Transit Company and others, defendants, to foreclose a trust deed given to secure twenty-five notes of the face value of \$25,000, in which John S. Level filed cross-bill setting up title and ownership of one of said notes, and in which, after decree in favor of cross complainant for \$1,213.88, Urban A. Lavery filed intervening petition setting up title by assignment to \$625 of the money in the hands of the master, which under said decree would otherwise be the money of cross complainant, to which petition C. S. Bellamy filed answer claiming by purchase from cross complainant all his right, title and interest in said decree. From a decree in favor of the petitioner, defendant Bellamy appeals.

CHASE R. RANKIN, for appellant.

MONTGOMERY, HART, SMITH & STEERE, for appellee.

MR. JUSTICE DEVER delivered the opinion of the court.

Delfosse v. Kendall, 205 Ill. App. 314.

Abstract of the Decision.

1. **MORTGAGES, § 578***—*what constitutes assignment of interest in decree of foreclosure and not of debt.* Where, pending a suit to foreclose a trust deed given to secure certain notes, the holder of one of the notes assigned his interest in the subject-matter of the suit, *held* that such was not an assignment of such holder's note but of his interest in any decree which might be rendered in the suit and of his right and title to a chose in action.

2. **MORTGAGES, § 578***—*what are rights of assignees of interest of cross complainant in decree.* Where, after a decree was entered in a foreclosure suit finding and adjudging a certain cross complainant was entitled to a certain sum under the trust deed sued on, the cross complainant assigned all his interest in the decree, *held* that the assignee took such interest subject to all the equities and rights then existing in prior assignees of the same fund.

3. **ASSIGNMENTS, § 24***—*what does not affect right and title of assignee under.* The right and title of an assignee under an assignment of a chose in action being sued upon, which was valid as against subsequent assignees to the fund assigned, would not be affected by the filing in court of a subsequent assignment.

Joseph T. Delfosse, Appellee, v. Anna N. Kendall, Appellant.

Gen. No. 22,744. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HOSER W. WELLS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by Joseph T. Delfosse, plaintiff, against Anna N. Kendall, defendant, to recover on a promissory note for \$1,575 signed by defendant, made payable to herself and by her indorsed. From a judgment for plaintiff for \$1,737.49, on a directed verdict, defendant appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

SAMUEL B. HILL and WILLIAM SCOTT STEWART, for appellant.

GEORGE L. SCHEIN, for appellee.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

1. **BILLS AND NOTES, § 371***—*when evidence of fraud properly excluded as not within defenses made in affidavits of merits.* In an action on an assigned note to which the defendant filed an affidavit of merits that the note was without consideration and was transferred to plaintiff merely for collection and to avoid a defense of fraud, and an amended affidavit of merits denying the execution, indorsement and delivery of the note, evidence that defendant signed the note by trickery and fraud by being led to believe it was a note for a less amount, *held* to be properly excluded as not within the defenses made in the affidavits of merits.

2. **BILLS AND NOTES, § 260***—*what defense is not available against bona fide purchaser before maturity.* A defense to a note sued on by an assignee that it had been transferred in violation of an agreement made when it was signed that it would not be assigned, *held* to be unavailable in an action on the note brought by one who procured it for a valuable consideration before maturity and without notice of such defense.

3. **BILLS AND NOTES, § 371***—*when affidavit of merits is insufficient to warrant admission of evidence of fraud in procuring signature.* An averment in an affidavit of merits that the defendant had not executed or indorsed the note sued on, *held* insufficient to warrant the admission of evidence that defendant had signed and indorsed the note as the result of fraudulent conduct on the part of the party procuring its execution.

4. **APPEAL AND ERROR, § 1361***—*what does not constitute abuse of discretion warranting reversal.* Refusal of the court to permit the defendant during the course of trial to file an additional affidavit of merits, *held* under the circumstances not such abuse of judicial discretion as to warrant reversal.

5. **NEW TRIAL, § 102***—*when affidavit as to discovery of new facts filed on motion to vacate judgment is insufficient.* An affidavit of defendant's counsel, filed on motion to vacate a judgment, that he

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Adolphus v. Kendall, 205 Ill. App. 316.

had discovered new facts which if introduced on another trial would contradict certain statements of plaintiff, *held* to be insufficient to show why such facts were not introduced at the trial or before judgment, or to materially aid in determining plaintiff's right to recover.

Wolfe Adolphus, Appellee, v. Anna N. Kendall, Appellant.

Gen. No. 22,746. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. RUFUS F. ROBINSON, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Wolfe Adolphus, plaintiff, against Anna N. Kendall, defendant, to recover on two promissory notes for \$1,000 and \$500, respectively, signed by defendant, made payable to her order and indorsed by her. From a judgment for plaintiff for \$1,600, on a directed verdict, defendant appeals.

SAMUEL B. HILL and WILLIAM SCOTT STEWART, for appellant.

GEORGE L. SCHEIN, for appellee.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

1. **BILLS AND NOTES, § 447***—*when evidence sufficient to show alteration in date of notes. Evidence held insufficient to warrant finding that the notes sued on had been altered in their date.*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Verhoeven v. Ingebrutsen et al., 205 Ill. App. 317.

2. **BILLS AND NOTES, § 420***—*when exclusion of evidence that plaintiff had received payment for his indorsement is erroneous.* Refusal of the court to allow defendant in an action on an indorsed note by the indorser to show that plaintiff had received money for his indorsement and that he should not be permitted to recover more than he had paid, *held* not to be error.

3. **BILLS AND NOTES, § 258***—*when defense of maker of lack of consideration and use in violation of agreement is unavailable against indorser.* A defense by the maker of a note sued on by an indorser thereon that the note was without consideration and was used by the party procuring its execution in violation of an agreement with defendant, *held* not to be available to defendant in such action where plaintiff indorsed the note after defendant had executed and indorsed it and there was no evidence tending to show plaintiff had knowledge of such agreement.

**Peter J. Verhoeven for use of Clarence Verhoeven,
Assignee, Appellee, v. J. Otto Ingebrutsen and
Anna Ingebrutsen, Appellants.**

Gen. No. 22,751. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. FREDERICK A. SMITH, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Bill by Peter J. Verhoeven, for use of Clarence Verhoeven, assignee, complainant, against J. Otto Ingebrutsen and Anna Ingebrutsen, defendants, to enforce a subcontractor's lien under the Mechanics' Lien Act. From a decree for the complainant for the sum of \$485, defendants appeal.

JOHN B. FREUCHTL, for appellants.

COONEY & VERHOEVEN, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Verhoeven v. Ingebrutsen et al., 205 Ill. App. 317.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 410***—*when objection as to defect of parties is too late.* Where a petition by a subcontractor to establish a lien under the Mechanics' Liens Act and the summons issued thereon made the original contractor a defendant with the owner of the building on which the lien was sought to be established, but no service was had on the original contractor and the suit proceeded to decree against the owner alone, a complaint that the original contractor should have been made a party to the proceeding, *held* to be too late when first made on appeal.

2. **MECHANICS' LIENS**—*when owner charged with notice of right of subcontractors to enforce payment of contracts out of building.* The owner of a building is bound by law with notice of the existence under the Mechanics' Liens Law of the fact that subcontractors would, within the specified legal time, have the right to enforce payment of their contracts with the original contractor from such owner out of such building.

3. **MECHANICS' LIENS, § 196***—*when need not be shown that owner owed original contractor.* It is not necessary, in a suit to enforce a subcontractor's lien under the Mechanics' Liens Act, to show that the owner owed the original contractor at the time the subcontractor served a lien notice on the owner.

4. **MECHANICS' LIENS, § 196***—*when evidence sufficient to show petition to enforce is filed in apt time.* Evidence held to show that a petition to enforce a subcontractor's lien under the Mechanics' Liens Act was filed in apt time after completion of the work.

5. **MECHANICS' LIENS, § 196***—*when evidence is sufficient to show that owners did not make premature payment.* Evidence held sufficient to show that the owners of a building did not pay the sum due under their contract before the work required by it was in fact completed, in a suit to enforce a subcontractor's lien under the Mechanics' Liens Act.

6. **MECHANICS' LIENS, § 196***—*when evidence is sufficient to show waiver by owners of time of completion of work.* Evidence held sufficient to show that the owners of a building waived their right to insist on a provision of their contract with original contractor for completion of the work by a certain date specified therein, in a suit by a subcontractor to establish his lien under the Mechanics' Liens Act.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

William E. Dee Company, Appellant, v. Jacob J. Hubbard, Appellee.

Gen. No. 22,754. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. CHARLES H. BOWLES, Judge, presiding. Heard in this court at the October term, 1916. Reversed and judgment here. Opinion filed April 16, 1917.

Statement of the Case.

Action by William E. Dee Company, a corporation, plaintiff, against Jacob J. Hubbard, defendant, to recover \$424 for the construction of a dynamometer. From a judgment for defendant, plaintiff appeals.

JOHN M. QUINLAN, for appellant.

FRANK L. CHILDS and BERYL HOWARD CHILDS, for appellee.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

PRINCIPAL AND AGENT, § 183*—*when evidence is sufficient to show ratification of contract by principal. Evidence held sufficient to show that defendant authorized or ratified the contract sued on for the construction by plaintiff of a dynamometer which was made by a third person with plaintiff.*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lusch v. Rittenhouse et al., 205 Ill. App. 320.

**Harry B. Lusch, Appellant, v. Charles J. Rittenhouse
and Walter Rittenhouse, Executors, Appellees.**

Gen. No. 22,757. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by Harry B. Lusch, plaintiff, against Charles J. Rittenhouse and Walter Rittenhouse, executors of the estate of Moses F. Rittenhouse, deceased, defendants, to recover upon a certain contract by letter signed by the decedent. From a judgment for defendants, plaintiff appeals.

FREDERICK W. SNIDER, for appellant.

BULKLEY, MORE & TALLMADGE, for appellees.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

INJUNCTION—when contract by surety on bond relating to appeal includes review by writ of error. Where the surety upon an injunction bond agreed by a certain contract upon consideration of the filing of suggestion of damages on dissolution of the injunction instead of commencing an action on the injunction bond that he would abide by "the final determination of said suggestion of damages by said Superior Court, or upon final determination of any appeal that may be taken from any award that may be rendered * * * by said Superior Court," held that the word "appeal" as so used embraced a writ of error by means of which a final determination of the suggestion of damages or award was reached.

Anton Reinick, Appellee, v. Frank Smetana, Appellant.

Gen. No. 22,772. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTTILL, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded. Opinion filed April 16, 1917.

Statement of the Case.

Action by Anton Reinick, plaintiff, against Frank Smetana, defendant, to recover damages for injuries sustained by being struck by defendant's automobile. From a judgment for plaintiff for \$1,000, defendant appeals.

SABATH, STAFFORD & SABATH, for appellant; CHARLES B. STAFFORD, of counsel.

C. J. WABING, for appellee.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1411*—*when finding of jury not disturbed.* The finding of a jury will not be disturbed upon controverted questions where there is a direct and sharp conflict in the evidence.

2. INSTRUCTIONS, § 7*—*when accuracy in is necessary.* Where the evidence is sharply conflicting, it is obligatory on the court to accurately instruct the jury as to the law applicable to the case.

3. AUTOMOBILES AND GARAGES, § 3*—*when modification of instruction is improper.* In an action to recover damages for injuries sustained by being struck by defendant's automobile while driven by another, an instruction that plaintiff in order to recover must show not only that the car belonged to defendant but that it was driven by another for defendant and on defendant's business, held to be proper as offered and improperly modified by the court by adding

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Dewey v. Lindhout, 205 Ill. App. 322.

after the word "business" the words "or by and with the consent of" defendant.

4. AUTOMOBILES AND GARAGES, § 3*—*when instruction on liability of owner for injury by third person driving car is improperly modified.* In an action to recover damages for injuries sustained by being struck by an automobile, an instruction that if the jury believed from the evidence that the defendant consented to and permitted a certain other party to take the automobile, and that in taking it such party was doing it for his own purposes and his own use and that the accident happened and plaintiff was injured while the said automobile was so being driven by such party, then the jury should find the defendant not guilty, *held* proper as offered and improperly modified by the court by striking out the word "not" before the word "guilty."

5. AUTOMOBILES AND GARAGES, § 2*—*when owner of automobile driven by another is liable for injuries to a person.* The owner of an automobile operated by another is only liable for injuries to a person where it is shown by a preponderance of the evidence that the person operating such automobile is in some degree acting for such owner or that he is operating such vehicle in and about the owner's business.

**A. Delbert Dewey, Appellee, v. J. C. K. Lindhout,
Individually and as Trustee, Appellant.**

Gen. No. 22,738. (Not to be reported in full.)

Appeal from the City Court of Chicago Heights; the Hon. CHARLES H. BOWLES, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded with directions. Opinion filed April 16, 1917.

Statement of the Case.

Bill by A. Delbert Dewey, complainant, against J. C. K. Lindhout, individually and as trustee, defendant, for injunction to restrain defendant from disposing of a certain fund. From a decree ordering defendant to

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

pay \$182.03 costs of suit and permanently restraining him from disposing of said fund, defendant appeals.

FRANCIS X. BUSCH, for appellant.

GEORGE A. BRINKMAN, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. TRUSTS, § 201*—*when evidence insufficient to warrant finding that trustee was wrongfully in possession of certain money.* Evidence held not to warrant a finding that defendant was wrongfully in possession of certain money received by him, as counsel for complainant's wife in a certain suit for divorce brought by her against complainant, pursuant to an agreement in the nature of an alimony agreement entered into between complainant and his wife, whereby he agreed that all debts of himself and herself should be paid under the supervision of defendant out of a certain fund to be paid in consideration of complainant delivering a deed and bill of sale of his property.

2. TRUSTS, § 201*—*when evidence sufficient to show absence of fraud by trustee.* Evidence held sufficient to show that defendant acted without any fraud or improper acts in his dealings with complainant and with diligence, discretion and fidelity to his client, complainant's wife, in receiving and disposing of a certain fund under a certain agreement between complainant and his wife in the nature of an alimony agreement.

3. TRUSTS, § 153*—*when deposit of funds in bank lies within discretion of trustee.* Where an attorney, who had represented a wife in a divorce suit, received money as a trustee, pursuant to an alimony agreement, whereby the husband agreed that all debts of both should be paid under the supervision of the attorney out of a fund created by the payment of a certain sum in consideration of the husband delivering a deed and bill of sale of his property, held that authority of the trustee to deposit the money in a bank might be inferred from his relationship to the parties and the fund, and that such depositing of the money was a matter resting in his discretion.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Bennett Medical College, 205 Ill. App. 324.

The People of the State of Illinois ex rel. Michelangelo Pacella, Appellant, v. Bennett Medical College, Appellee.

Gen. No. 22,752. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Petition of mandamus by the People of the State of Illinois on the relation of Michelangelo Pacella, petitioner, against the Bennett Medical College, a corporation, respondent, to compel respondent to issue to petitioner a diploma of graduation as a doctor in medicine, duly executed by defendant's officers. From a decree dismissing the petition, petitioner appeals.

MICHELANGELO PACELLA, for appellant.

No appearance for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. COLLEGES AND UNIVERSITIES, § 9*—*when evidence sufficient to show that student had not passed required examinations.* Evidence held sufficient to sustain respondent's answer to a petition for mandamus to compel respondent to issue to petitioner a duly executed graduation diploma as a doctor in medicine, setting up that petitioner had not passed the required satisfactory examination in all branches.

2. COLLEGES AND UNIVERSITIES, § 9*—*who must be judge of qualifications of medical students.* A medical school must be the judge

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Cohn et al. v. Bernstein et al., 205 Ill. App. 325.

of the qualifications of its students to be granted the degree of doctor of medicine.

3. COLLEGES AND UNIVERSITIES, § 9*—*when courts will not pass upon attainments of students.* Courts are not supposed to be learned in medical science and are not qualified to pass an opinion as to the attainments of a student in medical science.

4. COLLEGES AND UNIVERSITIES, § 9*—*what is not evidence that student is entitled to genuine diploma.* The presenting to a medical student at the time of graduation of a blank diploma not filled out with his name or a degree or title, held not to be evidence that such student was entitled to a genuine diploma.

Isidor Cohn and Herman Cohn, trading as Cohn Brothers Cigar Company, Appellees, v. S. Bernstein and A. Swidler, Appellants.

Gen. No. 22,762. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. DENNIS W. SULLIVAN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917. Rehearing denied April 30, 1917.

Statement of the Case.

Action by Isidor Cohn and Herman Cohn, trading as Cohn Brothers Cigar Company, plaintiffs, against S. Bernstein and A. Swidler, defendants, upon a written guaranty to the extent of five hundred dollars of credit of Charles Piantry. From a judgment for plaintiffs for five hundred dollars, defendants appeal.

SMITH, FAKE, LEVINSON & HOFFMAN, for appellants;
EUGENE R. COHN, of counsel.

BLUM, WOLFSOHN & BLUM, for appellees.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Cohn et al. v. Bernstein et al., 205 Ill. App. 325.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. **GUARANTY**—*when evidence sufficient to show execution of contract as sureties.* Evidence held sufficient to warrant the finding that defendants executed the contract of guaranty sued on as sureties.

2. **APPEAL AND ERROR, § 269***—*what are final appealable orders.* Where after entry of judgment against defendants they filed motion to set aside the judgment and grant a new trial, which was denied, held that defendants had the right to two appeals, one from the original judgment and one from the denial of the motion, as the orders for both entry of judgment and denial of the motion were final appealable orders.

3. **APPEAL AND ERROR, § 19***—*when review on appeal confined to original judgment.* Where, after a motion for new trial and in arrest of judgment against defendants was denied and judgment was entered against them, and thereafter a motion to set aside the judgment and grant a new trial was also denied and thereupon defendants prayed and were allowed an appeal and filed an appeal bond, which recited that the appeal was prosecuted from the original judgment entered, held that review on such appeal would be confined to the original judgment and would not embrace the final order denying the motion to set aside the judgment and grant a new trial.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Sarah L. Mead, Appellee, v. George H. Mead. Chicago & Northwestern Railway Company, Impleaded, Appellant.

Gen. No. 22,765. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. GEORGE A. KERSTEN, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded with directions. Opinion filed April 16, 1917.

Statement of the Case.

Bill by Sarah L. Mead, complainant, against George H. Mead, defendant, for divorce for drunkenness. The Chicago & Northwestern Railway Company impleaded by petition filed by complainant subsequent to decree for divorce, claiming that the railway company was indebted to defendant in the sum of \$7,000, and that complainant was entitled to be paid permanent alimony and solicitor's fees out of that fund. From a decree rendered on said petition setting aside certain assignments by defendant of a certain judgment for \$4,600.84 recovered by him against said company as fraudulent and void assignments, and ordering the company to pay complainant \$2,500, theretofore allowed her by former decree as alimony and solicitor's fees, within ten days, the Chicago & Northwestern Railway Company appeals.

IRVING HERBIOTT, for appellant; WILLIAM G. WHEELER, of counsel.

B. M. SHAFFNER, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Mead v. Mead, 205 Ill. App. 327.

Abstract of the Decision.

1. **DIVORCE, § 22***—*what is essential to jurisdiction of court to enter decree of alimony.* Without personal service upon or appearance by the defendant in a suit for divorce brought by the wife, the court is without jurisdiction to enter a decree for alimony, even though the defendant has property within the court's jurisdiction.

2. **JUDGMENT, § 6***—*when decree in personam cannot be entered.* Without personal service upon or appearance by a party, no money decree in *personam* against him can be entered.

3. **COSTS, § 1***—*when judgment for cannot be entered.* A judgment for costs cannot be entered against a party not personally served or appearing.

4. **DIVORCE—when right to alimony ceases.** Upon death of a husband his wife's right to alimony ceases.

5. **DIVORCE—when order allowing alimony is void as being without jurisdiction.** An order allowing alimony rendered after the husband's death is void and without jurisdiction, as the right depends upon the existence of a valid marital relation.

6. **DIVORCE—when order relating to alimony is void as being without jurisdiction.** Where an order was entered subsequent to a decree for divorce without personal service upon or appearance by the divorced husband relative to alimony and its allowance and collection out of a certain judgment recovered by him, such order held to be void as having been entered without jurisdiction.

7. **DIVORCE—when decree upon petition for allowance of alimony is void as being entered without jurisdiction.** Where a decree was entered upon a petition for allowance of alimony and solicitor's fees and for payment of same out of a certain judgment recovered by the husband, defendant in the divorce suit, finding that certain assignments of said judgment were null and void, and without personal service upon or appearance by the assignees, such decree held to be void as being entered without jurisdiction.

8. **JUDGMENT, § 576***—*when of foreign court entitled to full faith and credit.* Where a party intervened in a suit brought in another State by the assignee of a certain judgment to enforce same and also brought an independent suit in such other State against such assignee seeking to have the assignment declared invalid, decree entered in such foreign suits held entitled, under the United States Constitution, art. IV, sec. 1, to full faith and credit in a suit brought by such party in this State to set aside said assignment.

9. **INTERPLEADER—who may not be required to interplead.** A party resident in one State cannot be required to interplead in a suit instituted in another State.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Jackson v. Piowaty & Sons, 205 Ill. App. 329.

10. **APPEAL AND ERROR**—*when decree in which whole circuit bench is unanimous should be reversed.* Even if the whole circuit bench is unanimous in the entry of a decree which they are without jurisdiction to enter, it should be as readily reversed as if such error had been committed by but one member of the court.

William J. Jackson, Receiver, Appellee, v. M. Piowaty & Sons, Appellant.

Gen. No. 22,773. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. ARNOLD HEAP, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by William J. Jackson, receiver of the Chicago & Eastern Illinois Railroad Company, plaintiff, against M. Piowaty & Sons, a corporation, defendant, to recover balance claimed to be due for freight and other charges on certain tomatoes delivered on reconsignment to defendant. From a judgment for plaintiff for \$158.07, defendant appeals.

SABATH, STAFFORD & SABATH, for appellant; CHARLES B. STAFFORD, of counsel.

C. B. CARDY, for appellee; H. T. DICK, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. **CARRIERS**—*what does not constitute notice to carrier that person receiving goods is agent for shipper.* The fact that a party re-

Schwartz v. Hartman Furn. & Carpet Co., 205 Ill. App. 330.

ceiving certain goods shipped by a carrier is in the commission and brokerage business is not in itself notice to the carrier that such party was agent for the shipper.

2. CARRIERS—*when agent receiving goods for shipper is relieved from liability for freight charges.* Before a party receiving a shipment of goods as agent for the shipper can be relieved from liability for payment of the freight charges on the goods, in an action to recover such charges, it must affirmatively appear that the carrier had actual notice of such agency.

3. CARRIERS, § 33a*—*what is implied notice as to tariff rates.* The fact that tariff rates fixed by the Interstate Commerce Commission are on file at Washington is implied notice to all persons interested in such rates.

4. CARRIERS, § 29*—*validity of provisions of Interstate Commerce Act as to liability for freight charges.* The Interstate Commerce Act, providing that "the owner or consignee shall pay the freight and all other lawful charges," is constitutional.

5. CARRIERS—*when consignee is impliedly liable for charges.* A consignee receiving goods shipped is impliedly liable for the shipment charges.

**Abraham Schwartz, Appellee, v. Hartman Furniture
& Carpet Company, Appellant.**

Gen. No. 22,776. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in this court at the October term, 1916. Reversed without remanding. Opinion filed April 16, 1917.

Statement of the Case.

Proceedings by Abraham Schwartz, claimant, against the Hartman Furniture & Carpet Company, respondent, for compensation under the Workmen's Compensation Act. From a judgment for claimant, respondent appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Mioduszewski v. Spoganitz, 205 Ill. App. 331.

WILLIS G. SHOCKEY, WILEY W. MILLS and HENRIETTA KRIGHEL, for appellant.

No appearance for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the

Abstract of the Decision.

WORKMEN'S COMPENSATION ACT, § 12*—*necessity of making claim within prescribed period*. The making of a claim within the six months' period as required by the Workmen's Compensation Act is mandatory and cannot be dispensed with, and no right of action exists without proof of such claim within the time limited by the act.

Leopold Mioduszewski, Appellee, v. Stefan Spoganitz, Appellant.

Gen. No. 22,779. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. PATRICK B. FLANAGAN, Judge, presiding. Heard in this court at the October term, 1916. Appeal dismissed. Opinion filed April 16, 1917.

Statement of the Case.

Action by Leopold Mioduszewski, plaintiff, against Stefan Spoganitz, defendant. From a judgment for plaintiff, defendant appeals.

MAXIMILIAN J. ST. GEORGE and B. F. BARTEL, for appellant.

FERGUSON & GOODNOW, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Mioduszewski v. Spoganitz, 205 Ill. App. 331.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1105*—*when motion to dismiss appeal is properly allowed.* Motion to dismiss appeal for failure to have appeal bond and bill of exceptions approved within the time limited by the order allowing such appeal, *held* to be properly allowed.

2. MUNICIPAL COURT OF CHICAGO, § 25*—*when bond and bill of exceptions are not filed in proper time.* Where a judgment of the Municipal Court was entered June 27, 1916, and appeal was prayed and allowed upon filing appeal bond to be approved by a judge of the court within thirty days from the date of the judgment, and bill of exceptions within sixty days, and the time for filing the bond was extended July 22, 1916, ten days, and a bond was filed and approved August 5, 1916, and on August 25, 1916, was ordered stricken from the files, which order was vacated August 29, 1916, and order entered to file a new bond *nunc pro tunc* as of August 25, 1916, and a new bond was filed and approved August 30, 1916, and bill of exceptions September 27, 1916, *held* that neither the bond nor the bill of exceptions was filed within the time in which the court had jurisdiction to approve the same.

3. MUNICIPAL COURT OF CHICAGO, § 25*—*when has no jurisdiction to approve appeal bond.* The Municipal Court of Chicago has no jurisdiction to approve an appeal bond after the lapse of thirty days from the entry of the judgment.

4. MUNICIPAL COURT OF CHICAGO, § 25*—*who should approve appeal bond.* Under the Municipal Court Act an appeal bond should be approved by the judge, and an order of approval by the court is not required.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Edward J. Haley, Appellant, v. Chicago City Bank,
Appellee.****Gen. No. 22,783. (Not to be reported in full.)**

Appeal from the Superior Court of Cook county; the Hon. MAZINI SLUSSEK, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by Edward J. Haley, surviving partner of Haley & Company, plaintiff, against the Chicago City Bank, defendant, to recover on two checks for \$2,500 and \$1,000, respectively, given for two notes for \$2,600 and \$1,100, respectively. From a judgment of *nil capiat* and costs, plaintiff appeals.

CYRUS HEREN, D. AVERY KIMBARK and I. T. GREEN-ACRE, for appellant.

MILLER, STARR, BROWN, PACKARD & PECKHAM, for appellee; JOHN J. PECKHAM and EDWARD O. BROWN, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. **BILLS AND NOTES, § 440***—*when evidence is sufficient to show receipt of consideration for checks.* Evidence held sufficient to show that plaintiff received the consideration for which certain checks were given by him.

2. **BILLS AND NOTES, § 120***—*who may question indorsement on checks.* Where certain checks payable to one party were indorsed by such party with the name of another party, held, in an action by the drawer of the checks to recover thereon against the bank paying same, that no one but such other party or her personal representatives would have any legal right to question the indorsement of her name on the checks.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Mahalek v. Merchants Reserve Life Ins. Co., 205 Ill. App. 334.

Marie Mahalek, Appellee, v. Merchants Reserve Life Insurance Company, Appellant.

Gen. No. 22,788. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTTILL, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by Marie Mahalek, plaintiff, against the Merchants Reserve Life Insurance Company, defendant, to recover on a life insurance policy. From a judgment for plaintiff for \$1,161.39, defendant appeals.

GIDEON S. THOMPSON, for appellant.

HART E. BAKER, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 436*—*what is sufficient notice of insured's death obviating necessity of formal proofs.* Where notice of an insured's death was given to the president of the insurer company who replied "all right, they would go and see him," held that this afforded the insurer all opportunity necessary for it to verify the death and ascertain the cause thereof, notwithstanding no formal proofs of death contemplated by the policy were made.

2. INSURANCE, § 456*—*when formal proofs of death are waived.* Where the insurer in a life insurance policy refused to pay upon the ground that the insured's answers to questions touching his health in his application for the policy were false, held that formal proofs of death contemplated by the policy were waived.

3. INSURANCE, § 452*—*when notice of loss is waived.* Where the defense to an action to recover on a life insurance policy is

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Cantwell v. Gen. Accl., Fire & Life Assur. Corp., 205 Ill. App. 335.

placed on other grounds than the death of the insured, notice of loss is waived.

4. INSURANCE, § 659*—*when evidence is sufficient to show truth of statements in application.* Evidence in an action on a life insurance policy, held to warrant finding that the insured's statements in his application for life insurance as to his health were true and not false.

5. INSURANCE, § 663*—*what is not evidence of knowledge of falsity of statements by insured in application.* A coroner's finding on autopsy that an insured's death was due to organic heart disease, held not to be evidence tending to prove that the insured consciously departed from the truth when he represented in his application for life insurance that he did not suffer from heart disease, in an action to recover on a life insurance policy.

**Robert E. Cantwell, Appellee, v. General Accident,
Fire & Life Assurance Corporation, Appellant.**

Gen. No. 22,791. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in this court at the October term, 1916. Reversed with finding of fact. Opinion filed April 16, 1917.

Statement of the Case.

Action by Robert E. Cantwell, plaintiff, against the General Accident, Fire & Life Assurance Corporation, defendant, to recover on a policy insuring an automobile against accident. From a judgment for plaintiff for \$177.31, defendant appeals.

JOHN A. BLOOMINGTON, for appellant.

No appearance for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Grossfeld & Roe Co. v. William Junker Co., 205 Ill. App. 336.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

INSURANCE, § 659*—*when evidence is sufficient to show that automobile did not collide with stationary object.* Evidence held sufficient to show that plaintiff's automobile was not, as alleged, at the time in question in collision with any post or any other stationary object, in an action to recover for damages to the automobile alleged to have been sustained by such collision.

Grossfeld & Roe Company, Appellee, v. William Junker Company, Appellant.

Gen. No. 22,796. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. PERRY L. PERSONS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917. Rehearing denied April 30, 1917.

Statement of the Case.

Action by Grossfeld & Roe Company, plaintiff, against William Junker Company, defendant, to recover upon a contract for the purchase by defendant of two hundred barrels of sugar, estimated at eighty thousand pounds, at the price of \$5.65 per hundred pounds. From a judgment for plaintiff for \$240, defendant appeals.

WILLIAM R. BRAND, for appellant.

BLUM, WOLFSOHN & BLUM, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Grossfeld & Roe Co. v. William Junker Co., 205 Ill. App. 336.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 154*—*what constitutes admission of existence of contract.* Testimony of a corporation defendant's president identifying his letter to plaintiff referring to "our contract of February 8, 1915" and annulling "our contract with you," held to be an admission of the contract, in an action to recover thereunder in which defendant's affidavit of merits denied the making of the contract.

2. MUNICIPAL COURT OF CHICAGO, § 13*—*what defenses defendant filing affidavit of merits is confined to.* A defendant in the Municipal Court is confined by the rules of that court to the defenses made in his affidavit of merits.

3. SALES, § 376*—*what is measure of damages for breach of contract for purchase of goods.* In an action to recover for breach of a contract for the purchase of certain goods, the difference between the contract price and the market price on resale after such breach, held to be the measure of damages.

4. MUNICIPAL COURT OF CHICAGO, § 13*—*when affidavit of defense is insufficient.* An affidavit of defense filed in an action in the Municipal Court, stating merely that the defendant did not know plaintiff to be a corporation, held not to be sufficient to put plaintiff to proof of its incorporation.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Stiles v. Board of Trustees, 205 Ill. App. 338.

Arthur A. Stiles, Appellee, v. Board of Trustees of Police Pension Fund of West Chicago Park Commissioners, Appellant.

Gen. No. 22,799. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. OSCAR E. HEARD, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded with directions. Opinion filed April 16, 1917. Rehearing denied May 1, 1917.

Statement of the Case.

Petition of mandamus by Arthur A. Stiles, petitioner, against the Board of Trustees of the Police Pension Fund of the West Chicago Park Commissioners, respondent, to compel respondent to grant petitioner a pension as captain of police. From a judgment for petitioner, respondent appeals.

JACOB C. LE BOSKY and WILLIAM LEVINE, for appellant.

A. G. DICUS, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

MUNICIPAL CORPORATIONS, § 143*—*when member of police force of park commissioners is entitled to pension.* Rev. St. ch. 105, sec. 339 (J. & A. ¶ 8286), providing that any person after having served twenty years or more on the regularly constituted police force of the board of park commissioners of certain towns, or whose combined years of service should aggregate twenty years or more, shall be paid a yearly pension "after his service on such police force shall have ceased," construed to mean where the service shall legitimately cease voluntarily or by stress of physical troubles, and not by expulsion or misconduct.

McSURELY, P. J., dissenting.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Harry H. Talcott et al., Appellees, v. American Board of Commissioners for Foreign Missions and Congregational Home Missionary Society, Appellants.

Gen. No. 22,802. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Bill by Harry H. Talcott, James S. Barstow, personally and as trustee for Fayette C. Barstow, Fanny B. Perkins and Dorothy B. Pettibone, complainants, against the American Board of Commissioners for Foreign Missions and the Congregational Home Missionary Society, defendants, to ascertain, settle and decree the rights of the several parties in and to a fund of \$5,400 represented by a certain note secured by trust deed conveying certain real estate. From a decree, upon demurrer overruled to a part and answer to the remainder of the bill, finding defendants had no interest in said fund and directing that it be transferred to complainant James S. Barstow as trustee, defendants appeal.

DAVID FALES and JOHN B. MONTGOMERY, for appellants.

CASSODAY, BUTLER, LAMB & FOSTER, for appellees; HERBERT POPE, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. TRUSTS, § 25*—when irrevocable trust is not created. A document directing a certain party to hold certain notes in trust for

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Talcott v. American Board of Commissioners, 205 Ill. App. 339.

the use of the signer of the document during the signer's life and on her death, "when money becomes due and is paid," to dispose of such money to specified donees and to make the bequests "in the name of a friend," *held* not to create an irrevocable trust.

2. WILLS, § 64*—*when document is void as constituting insufficient testamentary disposition.* A document directing a certain party to hold certain notes in trust for the use of the signer of the document during the signer's life and on her death, "when money becomes due and is paid," to dispose of such money to specified donees and to make the bequests "in the name of a friend," *held* void as a testamentary disposition and as not fulfilling the legal requirements of a will.

3. WILLS, § 374*—*when note secured by trust deed becomes part of estate and passes by will.* Where a document directed a certain party to hold certain notes in trust for the use of the signer of the document during the signer's life and on her death, "when money becomes due and is paid," to dispose of such money to specified donees and to make the bequests "in the name of a friend," and such signer did not die until after the notes had been paid and the money invested in other property in the form of a note secured by trust deed on certain real estate, *held* that the latter note became a part of the signer's estate on her death and passed under the residuary clause of her will, notwithstanding the provisions of the document.

4. TRUSTS, § 12*—*when document cannot be treated as a declaration of trust.* What is clearly intended as a voluntary assignment or gift but is imperfect as such cannot be treated as a declaration of trust.

5. TRUSTS, § 28*—*when document creating trust is void for remoteness.* Where a document provided that a certain party named therein should hold certain notes in trust for the use of the signer of the document during the signer's life and on her death, "when money becomes due and is paid," should dispose of such money to specified donees, *held* that if the words "when money becomes due and is paid" were of controlling importance as designating a time when the trust fund should be paid to the beneficiaries, the document would be void for remoteness.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

D. T. Cahill, Appellee, v. J. J. Cahill, Appellant.

Gen. No. 22,811. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HOSHA W. WELLS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917. Rehearing denied April 30, 1917.

Statement of the Case.

Action by D. T. Cahill, plaintiff, against J. J. Cahill, defendant, to recover on a promissory note for \$750 indorsed by defendant. From a judgment for plaintiff for \$581, defendant appeals.

OTTO G. RYDEN, for appellant.

GEORGE M. WEICHELDT, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. **BILLS AND NOTES, § 450***—*when evidence is sufficient to show demand of payment upon indorser.* Evidence held sufficient to warrant finding that demand of payment of the note sued on was made upon defendant as indorser thereon, in an action to recover on said note.

2. **BILLS AND NOTES, § 272***—*when demand of payment upon indorser is necessary.* Demand of payment of a note upon an indorser is necessary under the Negotiable Instruments Act.

3. **BILLS AND NOTES, § 287***—*when protest is unnecessary.* No protest is necessary under the Negotiable Instruments Act of an inland bill.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Watkins v. Peoples Gas Regulator Co., 205 Ill. App. 342.

Charles W. Watkins, Appellee, v. Peoples Gas Regulator Company, Appellant.

Gen. No. 22,815. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. DENNIS W. SULLIVAN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by Charles W. Watkins, plaintiff, against The Peoples Gas Regulator Company, defendant, to recover under a certain contract whereby defendant agreed to pay plaintiff fifty per cent. of the gross income on all rental business that might be turned over and accepted by defendant and which was secured by plaintiff or his agents, one-half of a collection of \$86.10 made by defendant on such business. From a judgment for plaintiff for \$43.05, defendant appeals.

THOMAS LINDSKOG, for appellant.

ROBERT J. BIEG, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

CONTRACTS—when contract construed to require party to turn over rental business. A contract whereby defendant agreed to pay plaintiff fifty per cent. of the gross income of all rental business that might be turned over by plaintiff and accepted by defendant, construed to require plaintiff to turn over to defendant rental business and not to require plaintiff to collect rentals.

Kleiman v. Chicago & Northwestern Railway Co., 205 Ill. App. 343.

Jennie Kleiman, Appellant, v. Chicago & Northwestern Railway Company, Appellee.

Gen. No. 22,822. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. KICKHAM SCANLAN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by Jennie Kleiman, plaintiff, against the Chicago & Northwestern Railway Company, defendant, to recover damages for personal injuries sustained by plaintiff being struck by the sudden lowering of the gates at defendant's railroad tracks while plaintiff was crossing in her automobile. From a judgment for plaintiff for five hundred dollars, plaintiff appeals.

ISRAEL COWEN, for appellant.

IRVING HERRIOTT and IRA C. BELDEN, for appellee;
WILLIAM G. WHEELER, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the

Abstract of the Decision.

1. APPEAL AND ERROR, § 1411*—*when finding of jury will not be disturbed.* The finding of the jury upon a controverted question of fact will not be disturbed unless it can be said to be manifestly contrary to the greater weight of the evidence, or unless there are such errors in the rulings of the court upon the admission or exclusion of evidence or upon instructions which injuriously affected the cause of a party.

2. EVIDENCE, § 439*—*when answer of medical witness to hypothetical question is incompetent.* Where the answer of a medical

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kleiman v. Chicago & Northwestern Railway Co., 205 Ill. App. 343.

witness to a hypothetical question was based in part, as testified to by him, upon his own knowledge of the plaintiff's case and his personal opinion, *held* that such answer was incompetent and properly excluded.

3. DAMAGES, § 191*—*when question whether ailments of woman are proximately attributable to accident is for jury.* In an action to recover damages for personal injuries sustained by plaintiff being struck on the head by the gates being lowered at defendant's railroad crossing while she was passing, where plaintiff was shown to have suffered two miscarriages some time after the accident, *held* that it was within the province of the jury to determine whether the serious ailments suffered by plaintiff were proximately attributable to such accident or not.

4. DAMAGES, § 188*—*when evidence is sufficient to show that ailments of woman were not causally connected with accident.* Evidence *held* sufficient to sustain the finding that plaintiff's ailments suffered by her some time after the accident by which she sustained injuries to her head, as the result of being struck by railroad crossing gates, were not causally connected with such accident, in an action against a railroad company to recover damages for such injuries.

5. DAMAGES, § 242*—*when judgment not disturbed on account of inadequacy of.* A judgment will not be disturbed on review for mere inadequacy of damages awarded unless it is apparent that the verdict was the result of passion or prejudice in the jury or of errors of law by the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Christian C. H. Becker, Appellee, v. Benjamin F. J. Odell, Appellant.

Gen. No. 22,832. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Bill by Christian C. H. Becker, complainant, against Benjamin F. J. Odell, defendant, for foreclosure. From a decree for complainant, defendant appeals.

BENJAMIN F. J. ODELL, for appellant; MELVILLE R. ADAMS, of counsel.

RATHJE & WESEMANN, for appellee; GUY VAN SCHAICK, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

MORTGAGES, § 503*—*when evidence is insufficient to show agreement to extend loan by authorized person.* On a bill to foreclose a mortgage, evidence held to fail to show any agreement to extend the loan on which suit was brought by any one acting with authority from the owner.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

George R. Stewart, Appellee, v. William E. Dodson, Appellant.

Gen. No. 22,835. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1916. Reversed. Opinion filed April 16, 1917. Rehearing denied April 30, 1917.

Statement of the Case.

Action by George R. Stewart, plaintiff, against William E. Dodson, defendant, to recover on a certain contract providing that defendant would purchase within one year from date at a certain price certain shares of stock theretofore purchased by plaintiff from defendant if plaintiff should desire to sell same. From a judgment for the plaintiff for \$1,800, the amount of the stock at the price agreed, defendant appeals.

BUELL & ABBEY, for appellant.

GEORGE W. WILBUR, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

GAMING, § 16*—*what constitutes unenforceable gambling contract.* Where, long after plaintiff purchased certain stock from defendant and as no part of that purchase, plaintiff and defendant entered into a contract providing that defendant would purchase said stock at a certain price should plaintiff desire within one year from the date of the contract to sell the stock, *held* that the contract was a gambling contract and obnoxious to section 130 of the Criminal Code (J. & A. ¶ 3733), and unenforceable in the courts.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Helburn Leather Company, Appellee, v. Benjamin Stone and Jacob W. Stone, copartners, trading as Stone Brothers, Appellants.

Gen. No. 22,839. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by the Helburn Leather Company, a corporation, plaintiff, against Benjamin Stone and Jacob W. Stone, copartners, trading as Stone Brothers, defendants, to recover the agreed price of three bundles of leather bought of plaintiff. From a judgment for plaintiff for \$195.89, defendants appeal.

MAX M. GROSSMAN, for appellants; H. J. ROSENBERG, of counsel.

A. M. SCHWARZ, J. A. JOSEPH and M. E. BURR, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 129*—*what constitutes symbolical delivery of goods to consignees.* Delivery of goods f. o. b. a certain city, held to mean that the goods should arrive in such city, and when they did so arrive in the usual and customary course of transit the possession of the common carrier at such city was a symbolical delivery to the consignees who had ordered the goods and effective to vest the title of the goods in them.

2. CARRIERS, § 79*—*who may maintain action for wrongful or negligent delivery where goods are deliverable f. o. b. cars at destina-*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Weber Chimney Co. v. Johnson, 205 Ill. App. 348.

tion. Where goods are delivered to a common carrier for shipment to a purchaser f. o. b. cars at the purchaser's city and are at such city delivered by the carrier to another, any right of action for wrongful or negligent delivery lies only in favor of the purchaser against the carrier.

3. TRIAL, § 295*—*when request that proposition of law be passed upon is too late.* A request that propositions of law presented to a trial judge after entry of judgment be passed upon *nunc pro tunc* as of the date of the judgment is properly refused as being too late.

Weber Chimney Company, Appellant, v. Claude A. Johnson, Appellee.

Gen. No. 22,842. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action of attachment by the Weber Chimney Company, plaintiff, against Claude A. Johnson, defendant, as a nonresident debtor. From a judgment for defendant, plaintiff appeals.

FREDERIC BURNHAM, for appellant.

RANKIN, HOWARD & DONNELLY, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. ATTACHMENT, § 14*—*when evidence is sufficient to establish residence within State.* Evidence held sufficient to establish de-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Dixon v. Schwartz, 205 Ill. App. 349.

defendant's residence within the State, in an action in attachment against defendant as a nonresident debtor, where it appeared that defendant was a traveling man, absent from the State most of the time, but had rented a room in a house in a city within the State, carried a key and occupied the room when in the city.

2. ATTACHMENT, § 3*—*when act construed strictly*. An attachment is an extraordinary remedy, and the act is strictly construed against the party seeking to enforce its drastic provisions.

3. ATTACHMENT—*when grounds of must be strictly proven*. There are no presumptions in favor of plaintiffs in attachment suits; the grounds of attachment must be strictly proven.

4. ATTACHMENT—*residence as question of fact*. The question of residence in an attachment suit is one of fact.

5. DOMICILE, § 4*—*what considered in determining residence*. The question of residence is largely a matter of intent.

6. APPEAL AND ERROR, § 1500*—*when exactitude in rulings of court are not imperative*. Where the merits of the controversy are strongly in favor of the defendant, exactitude in the rulings of the court in procedure or on instructions are not imperative.

Arthur Dixon, Appellee, v. Ruby Schwartz, Appellant.

Gen. No. 22,852. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HARRY P. DOLAN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Arthur Dixon, plaintiff, against Ruby Schwartz, defendant, to recover on a guaranty of a lease. From a judgment for plaintiff for \$2,149.75, defendant appeals.

FRANK SCHOENFELD, for appellant.

CALHOUN, LYFORD & SHEEAN, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Dixon v. Schwartz, 205 Ill. App. 349.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. **GUARANTY**—*when evidence is sufficient to show execution of before signing and delivery of lease.* Evidence held sufficient to sustain the finding that the guaranty of a lease was executed before the signing and delivery of the lease by the lessor, in an action to recover on such guaranty.

2. **LANDLORD AND TENANT, § 443***—*when evidence is sufficient to show that lease was not canceled.* Evidence held sufficient to sustain the finding that the lease in question was not canceled by agreement of the parties, in an action to recover on a guaranty of the lease.

3. **GUARANTY, § 7***—*when no independent consideration is necessary.* Where a guaranty of a lease is executed before the execution and delivery of a lease by the lessor, no independent consideration is necessary.

4. **SEALS, § 2***—*when presumed that each person signing instrument adopted a seal.* When a bond or other sealed instrument purports on its face to be sealed by all its signers, and there are several seals to it, but not so many as there are names, it will be presumed that each person signing it adopted some one of the seals.

5. **GUARANTY, § 12***—*when is as broad as terms of lease.* A guaranty on a lease of "the payment of rent, and the performance of the covenants by the party of the second part in the within lease, covenanted and agreed, in manner and form as in said lease provided," held to be as broad in its terms as the lease.

6. **GUARANTY, § 16***—*when obligation of guarantor becomes fixed.* The obligation of the guarantor on a lease of payment of rent and performance of the covenants by the lessee in the lease, held to have become fixed upon default by the lessee of which the guarantor would not be entitled to notice, the guaranty being unconditional.

7. **GUARANTY, § 17***—*what is sufficient notice to guarantor of default.* Commencement of suit on the guaranty of a lease is sufficient notice to the guarantor of the lessee's default.

8. **LANDLORD AND TENANT, § 40***—*what does not constitute delivery of lease to lessee.* The handing of a lease to one of the parties to procure the signature of a guarantor thereto does not constitute a delivery thereof to the lessee, the lease not having been executed by the lessor.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Mazur v. Goderski et al., 205 Ill. App. 351.

9. LANDLORD AND TENANT—*what does not constitute possession of premises under lease.* Possession of premises by a lessee prior to execution and delivery of a lease therefor is not under such lease so far as the lessor's rights under the lease are concerned.

**Joseph Mazur, trading as Joseph Mazur & Company,
Appellee, v. Stanislaw Goderski and Pelagia God-
erski, Appellants.**

Gen. No. 22,755. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOHN J. SULLIVAN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 16, 1917.

Statement of the Case.

Action by Joseph Mazur, trading as Joseph Mazur & Company, plaintiff, against Stanislaw Goderski and Pelagia Goderski, defendants, to recover commissions as a real estate broker. From a judgment for plaintiff for three hundred dollars, defendants appeal.

C. C. H. ZILLMAN, for appellants.

BEACH & BEACH, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

BROKERS, § 88*—*when evidence is sufficient to show employment as broker.* Evidence held sufficient to sustain the finding that defendants employed plaintiff in the exchange of defendants' real estate, in an action to recover a commission on such exchange.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Com. Germania T. & S. Bk. v. W. M. Hoyt Co., 205 Ill. App. 352.

Commercial Germania Trust & Savings Bank, Appellee, v. W. M. Hoyt Company, Appellant.

Gen. No. 21,880.

1. **PLEDGES, § 24***—*when pledgee of warehouse receipts loses lien as against third parties without notice.* Where the owner of certain coffee pledged the warehouse receipts for same with his creditor as security for a debt due the creditor, who thereafter surrendered the receipts to the owner to enable him to make delivery of the coffee upon a sale thereof, and took in lieu of such receipts a trust receipt signed by the owner, agreeing to pay over to the creditor out of the proceeds of the sale the amount of the creditor's debt, *held* that under the laws of Louisiana, wherein the transaction occurred, the creditor thereby lost his lien as against third parties without notice.

2. **SALES**—*when breach of trust receipt does not affect validity of sale of goods.* Where the owner of certain coffee pledged the warehouse receipts for same with his creditor as security for his debt to the creditor, who thereafter surrendered the receipts to the owner to enable him to make delivery of the coffee upon a sale thereof and took in lieu of such receipts a trust receipt signed by the owner, agreeing to pay over to the creditor out of the proceeds of the sale the amount of the creditor's debt, and the owner thereupon sold and assigned the invoice of the sale for value to a party without notice of the prior transactions, but failed to turn over to his creditor out of the proceeds received on such sale and assignment the amount due the creditor as required by the trust receipt, *held*, in an action by such party to recover against the buyer of the coffee for the purchase price, that such breach by the owner of the trust receipt in no way affected the validity of the sale of the coffee or the right of the owner to make collection of the proceeds thereof from the plaintiff.

TAYLOR, J., dissenting.

Appeal from the Municipal Court of Chicago; the Hon. J. J. ROONEY, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 18, 1917. Rehearing denied May 8, 1917.

TENNEY, HARDING & SHERMAN, for appellant; GUSTAF R. WESTFELD and WILLARD C. McNITT, of counsel.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

DEFREES, BUCKINGHAM & EATON, for appellee.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

The Commercial Germania Trust & Savings Bank of New Orleans brought suit in the Municipal Court of Chicago against W. M. Hoyt Company of Chicago to recover the purchase price of one hundred and thirteen bags of coffee. The case was tried before the court without a jury and judgment was entered in favor of the plaintiff for the amount of its claim, to reverse which this appeal is prosecuted.

The facts, so far as material, are: The Smith Brothers Company, of New Orleans, importers and sellers of coffee, borrowed money from William Brandt & Sons Company, London bankers, through the latter's representatives, Westfeldt Brothers, bankers and forwarders of coffee, also of New Orleans, and pledged as security a warehouse receipt for ninety-four bags of coffee. Afterwards on June 13, 1913, The Smith Brothers Company sold one hundred and thirteen bags of coffee to the defendant, payment to be made within ten days from the date of the invoice, which was dated July 1, 1913. The coffee was sold f. o. b. New Orleans, and was to be delivered to Westfeldt Brothers as forwarding agents of the defendant. In order to deliver the coffee to the defendant, The Smith Brothers Company secured from Westfeldt Brothers, as agents for William Brandt & Sons Company, the warehouse receipt covering the ninety-four bags and gave in lieu thereof the following trust receipt:

“TRUST RECEIPT.

New Orleans, La., June 14, 1913.

“Received of Westfeldt Bros., Agts., the Bill of Lading or other documents or securities as enumerated below, held by the said Bank as collateral pledged

Com. Germania T. & S. Bk. v. W. M. Hoyt Co., 205 Ill. App. 352.

to secure advances made to the undersigned, and in consideration thereof, the undersigned hereby agrees to pay over to the said Bank or its assignees, and to specifically apply against the very same advances the proceeds of the sale of the property mentioned in said documents; or to deliver to the said Bank or its assignees the shipping documents or warehouse receipts representing the undermentioned goods within one day from the receipt thereof, this delivery being temporarily made the undersigned for convenience only, without novation of the original debt, or giving the undersigned any title thereto, except as trustee for the said Bank, and except to receive the avails thereof or the documents therefor for account of the said Bank.

“Crescent W. H. Cert. #1705 for 267 Bags Coffee. We want 94 bags for Hoyt.

THE SMITH BROS. CO., LTD.,
P. J. ORCHARD,

“S. B. C. K. 2 to 8 BA—4 Secty. & Treas.”

The Smith Brothers Company, after receiving the warehouse receipt, took the ninety-four bags of coffee, which were stored in a warehouse, and nineteen other bags, which they owned, and delivered them to the railroad company, and received a memorandum ticket for the coffee in the name of Westfeldt Brothers, agents, and delivered the same to them. Upon receipt of this memorandum ticket, Westfeldt Brothers, as forwarding agents for the defendant, secured a bill of lading for the coffee and sent it to the defendant in Chicago. The coffee was not to be forwarded immediately, but was to be held in New Orleans until such time as it could be sent in a carload lot.

On June 17th, The Smith Brothers Company sold and assigned the invoice against the defendant for the price of the coffee, receiving the face value thereof. On the same day plaintiff notified the defendant of the assignment and requested that payment be made direct to it. About a week afterwards The Smith Brothers Company were forced into bankruptcy. On

the next day Westfeldt Brothers, as agents for William Brandt & Sons Company telegraphed the defendant that they would forward the coffee if the defendant would pay them for the ninety-four bags, and on the next day they telegraphed the defendant requesting that it hold the purchase price of the ninety-four bags for them, if defendant had not already paid plaintiff, and stated that they would protect defendant with bonds. The defendant thereupon returned the bill of lading to Westfeldt Brothers, agents for William Brandt & Sons Company, and on June 30th sent a telegram to The Smith Brothers Company canceling the order for failure to ship the coffee according to contract.

Upon receipt of the bill of lading Westfeldt Brothers, as agents for William Brandt & Sons Company, disposed of the ninety-four bags of coffee and retained the proceeds thereof and returned the nineteen bags to The Smith Brothers Company. The defendant having refused to pay the purchase price of the coffee to the plaintiff, this suit was brought.

It is obvious that the defendant could not cancel the contract for the purchase of the coffee in the manner indicated, and had no authority to return the bill of lading to Westfeldt Brothers, as agents for William Brandt & Sons Company. But it is insisted that the rights of William Brandt & Sons Company, under the trust receipt, are superior to those of the plaintiff, because, it is urged, that under the law of Louisiana the rights of third parties are not protected against secret liens—that although the lien of William Brandt & Sons Company was secret and unknown to the plaintiff or the defendant until after the bankruptcy proceedings against The Smith Brothers Company, yet it is superior to plaintiff's claim based on the invoice. (*Lallande v. His Creditors*, 42 La. Ann. 507; *Stern Bros. v. Germania Nat. Bank*, 34

Com. Germania T. & S. Bk. v. W. M. Hoyt Co., 205 Ill. App. 352.

La. Ann. 1119; *Henderson v. Case*, 31 La. Ann. 215; *Bird v. Cockrem*, 82 La. Ann. 70; *In re Dreuil & Co.*, 205 Fed. 568; *Commercial Nat. Bank of New Orleans v. Canal-Louisiana Bank & Trust Co.*, 239 U. S. 520.)

In the *Lallande* case, *supra*, it was held that a factor authorized to sell the goods of his principal could not pledge the goods for his own debts so as to bind the principal.

The *Stern* case, *supra*, holds that where a matured negotiable instrument was placed in a third person's hands to collect, the latter could not pledge it to secure his personal loan and defeat the owner.

It was held in the *Henderson* case, *supra*, that the purchaser of a dishonored note from one not the owner nor authorized to sell did not acquire a good title as against the owner of the note.

In the *Bird* case, *supra*, the owner of past due promissory notes left them in the hands of a third person for safe-keeping. The latter pledged them as security for a personal loan. The court held that the owner's title was superior to that of the innocent pledgee.

It is clear that none of the above cases sustains the contention of the defendant that the rights of William Brandt & Sons Company, under the trust receipt, are superior to those of the plaintiff.

In the *Dreuil* case, *supra*, bills of lading covering certain cotton were pledged with a bank by the owner. Afterwards the bills of lading were surrendered and a trust receipt similar to the one in the case at bar was given to the bank. The owner of the property thereupon secured the cotton and deposited it in a warehouse and secured warehouse receipts in its own name, depositing these warehouse receipts with a second bank as collateral for a loan. The warehouse receipts were subsequently taken up by the owner and in lieu thereof a second trust receipt was given to the second bank. The owner obtained the cotton and

afterwards went into bankruptcy. In a contest between the two banks, it was held, that under the trust receipt given to the first bank, the owner had no authority to pledge the cotton to the second bank, and judgment was given in favor of the first bank, which was affirmed by the Circuit Court of Appeals. (211 Fed. 337.) A further appeal was prosecuted to the Supreme Court of the United States, where the judgments of the District Court and Circuit Court of Appeals were reversed and judgment entered in favor of the second bank. (*Commercial Nat. Bank of New Orleans v. Canal-Louisiana Bank & Trust Co.*, 239 U. S. 520.)

It is insisted that the reversal of the judgments by the Supreme Court was for the sole reason that under the Uniform Warehouse Receipts Act, warehouse receipts were negotiable, and that as the second bank receipted the warehouse receipts without notice of any claim of the first bank, its rights were superior to that of the first bank. We think, however, that the decision of the Supreme Court was not based alone on the provisions of the Uniform Warehouse Receipts Act, but it was also based on the ground of estoppel. In delivering the opinion of the court, Mr. Justice Hughes said, p. 524: "It is a familiar rule that one who has no title to chattels cannot transfer title unless he has the owner's authority or the owner is estopped. See Civil Code (La.) arts. 2452, 3142, 3145, 3146. It follows that, in the absence of circumstances creating an estoppel, one without title cannot transfer it by the simple device of warehousing the goods and indorsing the receipts. But if the owner of the goods has permitted another to be clothed with the apparent ownership through the possession of warehouse receipts, negotiable in form, there is abundant ground for protecting a bona fide purchaser for value to whom the receipts have been negotiated."

Com. Germania T. & S. Bk. v. W. M. Hoyt Co., 205 Ill. App. 352.

The court continuing, in discussing the Uniform Warehouse Receipts Act, said, p. 526: "It will be observed that 'one who takes by trespass or a finder is not included within the description of those who may negotiate.'" And on p. 527: "It was not the placing of the cotton in the warehouse in the usual course of business, but the negotiation of the receipts, that constituted the violation of Dreuil & Company's agreement with the Canal-Louisiana Bank. By the very terms of that agreement Dreuil & Company were to take the position of 'trustee' for the bank, with authority to receive 'the avails' of the goods or 'the documents' therefor for account of the bank, and being bound to apply the proceeds of sale to the bank's advances. * * * (p. 528). To repeat, it was the *negotiation* of the receipts that constituted the breach of trust. But after the Canal-Louisiana Bank had allowed Dreuil & Company to be clothed with apparent ownership through possession of the receipts, it cannot be heard to question the title of a bona fide purchaser for value to whom they had been negotiated. * * * (p. 529). It was because the Canal-Louisiana Bank clothed Dreuil & Company with the *indicia* of ownership that a bona fide purchaser for value was enabled to take title."

From this it appears that the Canal-Louisiana Bank, by reason of its clothing Dreuil & Company with the *indicia* of ownership, was estopped to assert its right against the second bank, the latter being a bona fide purchaser for value. In that case the only breach committed by Dreuil & Company was in the negotiation of the warehouse receipts, as it had authority to sell and collect the proceeds of the sale. In the case at bar, Westfeldt Brothers, agents for William Brandt & Sons Company, clothed The Smith Brothers Company with the *indicia* of ownership of the bags of coffee. The latter company, under the

trust receipt, was authorized to sell the coffee and collect the proceeds thereof, and the only breach, if any, committed by The Smith Brothers Company was in its failure to turn over the avails or proceeds of the sale which it received from the plaintiff, and this in no way affected the validity of the sale of the coffee, nor the transaction of The Smith Brothers Company in collecting the avails or proceeds thereof from the plaintiff.

Furthermore, the Supreme Court of Louisiana in the case of *Arbuthnot, Latham & Co. v. Richheimer & Co.*, 139 La. 797, 72 So. 251, held that secret liens, as provided for in a trust receipt similar to the one in the case at bar, could not affect the rights of innocent third parties. In that case the court said (pp. 253, 803): "The trust receipt at most was a private agreement between the parties, which, of course, did not affect third persons without notice."

In its last analysis, this is a case where William Brandt & Sons Company, who had a valid lien on the coffee, surrendered the property, and thereby gave up their lien and took in lieu thereof the trust receipt, which entitled them to receive from The Smith Brothers Company either the coffee or the proceeds of the coffee when sold. The coffee was sold, and William Brandt & Sons Company thereby became entitled to receive the purchase price as soon as The Smith Brothers Company collected it. The latter clearly had the right under the trust receipt to collect the purchase price from the appellant, or to obtain the "avails" of the sale by selling their claim to the bank. At the time they sold it they had a perfect right to receive the purchase price. There can be no doubt that the bank did actually purchase this claim against appellant, for the assignment distinctly directs the latter to pay the money "to the bank direct." The demand note was only for the latter's protection in case the claim was not paid in due course. The Smith

Stroud v. R. F. Conway Co., 205 Ill. App. 360.

Brothers Company, unquestionably had the right, under the terms of the trust receipt, to obtain the proceeds of the sale by selling the claim, which they did, and therefore the bank, who bought the claim and paid full value for it, became its absolute owner. The Smith Brothers Company in turn, as soon as they sold the claim, held the proceeds subject to the terms of the trust receipt which they had given to William Brandt & Sons Company.

The judgment of the Municipal Court of Chicago is correct and it is affirmed.

Affirmed.

MR. JUSTICE TAYLOR dissents.

Edmund H. Stroud, trading as E. H. Stroud & Company, Appellant, v. R. F. Conway Company, Appellee.

Gen. No. 21,900. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 18, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Edmund H. Stroud, trading as E. H. Stroud & Company, plaintiff, against R. F. Conway Company, defendant, to recover \$668.68 balance claimed to be due upon the purchase price of a pulverizing machine, and, by subsequent action consolidated, to recover \$114 for certain parts sold to defendant for repairing the same machine. From a judgment for defendant for \$1,219.32 on a counterclaim on account of money paid on the purchase price of the machine, plaintiff appeals.

ILES, O'CONNOR, EBERHARDT & KESLER, for appellant; CHARLES J. O'CONNOR and A. M. EBERHARDT, of counsel.

EDMUND S. CUMMINGS, for appellee.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. **CONTRACTS, § 187***—*what considered in construing contract.* It is always allowable to look to the interpretation placed upon a contract by the parties themselves.

2. **SALES, § 56***—*when letter is part of contract.* Where plaintiff submitted a written contract for the sale of a rock pulverizing machine, stating that the machine would receive "soft limestone * * * of good grinding quality" and reduce it at a certain rate to powder, and two days later wrote defendant, to whom the contract was submitted, explaining what was meant by the words quoted and stating that, if the matter of the grinding quality of the stone was to be left an open question, plaintiff would base its guaranty contained in the contract upon a certain less quantity of output, and the contract was thereafter signed, and plaintiff wrote defendant later, upon failure of the machine to produce the quantity of output provided for, and referred to the first letter as showing defendant was getting an average of what was promised on hard stone, *held* that the first letter was part of the contract and was properly admitted in evidence, in an action to recover the purchase price of the machine.

3. **SALES, § 329***—*when evidence is sufficient to show that seller waived objection as to manner of installation of machine.* Evidence, *held* sufficient to sustain the finding that plaintiff waived any objection to the manner in which a certain machine sold by plaintiff to defendant was installed, and that the machine as installed would produce more than if it had been installed in accordance with the plans and specifications submitted as required by the contract of sale, in an action for the purchase price of the machine.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Pritchard v. McGregor, 205 Ill. App. 362.

**Isaac W. Pritchard, Appellee, v. Margaret McGregor,
Appellant.**

Gen. No. 21,922. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. FREDERICK A. SMITH, Judge, presiding. Heard in this court at the October term, 1915. Affirmed in part, reversed in part and remanded. Opinion filed April 18, 1917. Rehearing denied April 27, 1917.

Statement of the Case.

Bill by Isaac W. Pritchard, as executor of the estate of Sarah P. Doane, deceased, complainant, against Margaret McGregor, defendant, to construe the will and codicil thereto of the deceased. From a decree construing the will and codicil, defendant appeals.

ROBERT L. LYONS, for appellant; MARTIN L. WILBORN, of counsel.

GEORGE W. HALL, for appellee; J. W. WHITEHEAD, of counsel.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. WILLS, § 489*—*when debts and funeral expenses are not charge upon land.* Where a will provided, among other things, that "after the payment of my debts and funeral expenses, I hereby give, devise and bequeath" to the testator's sister certain lots during the sister's natural life, then to certain other relatives for life, with remainder over to a certain Home, the words "after the payment of my debts and funeral expenses" held not to make such debts and expenses a charge upon the two lots referred to.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

2. APPEAL AND ERROR, § 855*—*when facts must be preserved by certificate of evidence.* Where there is an answer on file denying the allegations of a bill, in a chancery suit, the party obtaining relief, if the specific facts proven on the hearing are not found in the decree, must on appeal sustain the decree by preserving such facts by a certificate of evidence.

3. WILLS, § 429*—*when executor entitled to ask for construction of will.* The allegations of fact in the bill, the admissions in the answer and the decree, showing the decedent died leaving a will set up in the bill; that it was admitted to probate; that complainant qualified as executor; that decedent left surviving certain heirs at law; that she died seized of the real estate described in the will and in the decree, and that a controversy arose as to the true intent and meaning of certain provisions of the will, *held* to justify complainant in asking the Circuit Court for a construction of the will.

4. WILLS, § 226*—*what is sole purpose of construction.* The sole purpose of the construction of a will is to ascertain the intention of the testator that effect may be given to such intention, when not, contrary to public policy or in contravention of law.

5. WILLS, § 228*—*what is basis for determination of intent of testator.* The intention of a testator must be determined from an examination of the entire will.

6. EXECUTORS AND ADMINISTRATORS, § 77*—*when executor has no authority to collect rents.* Where a will devised to specified devisees all of the testator's real estate and provided in nominating and appointing an executor that such executor should "have full and exclusive possession of my entire estate until its final distribution," *held*, from an examination of the entire will and a codicil thereto, that no power or authority was given the executor to collect any rents from the real estate involved, notwithstanding there was a deficiency of personal assets to pay the deceased's debts, and that such provision as to possession of the entire estate until distribution applied only to the personal estate, if any.

7. WILLS, § 436*—*when question of construction of will as res judicata is not reviewable.* Where there was no admission in the pleadings and no finding in the decree from which appeal was taken as to an order by the County Court in which probate of a will was had construing such will, *held* that the question of *res judicata* as to the construction of the will was not before the court for review on appeal, on a bill to construe a will.

8. WILLS, § 423*—*when County Court has no jurisdiction.* County Courts have no jurisdiction to construe wills.

9. INFANTS, § 45*—*when court presumed to know value of services of guardian ad litem.* A court in allowing a fee to a guardian

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Schimanski v. Chicago Railways Co., 205 Ill. App. 364.

ad litem is presumed to know what the reasonable value of the services of the guardian is, notwithstanding there may have been no evidence upon which to base an allowance.

10. INFANTS, § 45*—*when allowance to guardian ad litem is not improper.* Where a fee of seventy-five dollars was allowed a guardian *ad litem*, held such allowance cannot be said to have been improper, notwithstanding there may have been no evidence upon which to base it.

**Ferdinand Schimanski, by Otto Schimanski, Appellee,
v. Chicago Railways Company, Appellant.**

Gen. No. 21,939. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 18, 1917. Rehearing denied May 3, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Ferdinand Schimanski, by Otto Schimanski, his father and next friend, plaintiff, against the Chicago Railways Company, defendant, to recover damages for personal injuries sustained by plaintiff while alighting from defendant's street car. From a judgment for plaintiff for \$2,250, defendant appeals.

WATSON J. FERRY, for appellant; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

GALLAGHER & MESSNER, for appellee.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Abstract of the Decision.

1. CARRIERS, § 476*—*when evidence is sufficient to sustain finding for plaintiff as to accident.* Evidence held sufficient to warrant the finding for plaintiff notwithstanding his description of the car and manner in which his clothing caught at the time he was injured was inaccurate as to some details, in an action to recover damages for personal injuries sustained while alighting from defendant's street car.

2. APPEAL AND ERROR, § 1563*—*when refusal of instruction is not reversible error.* It is not reversible error to refuse an instruction denying the right of recovery under certain counts of a declaration where there is evidence tending to prove the allegations of other counts.

3. INSTRUCTIONS, § 151*—*when refusal of instruction is not error.* Refusal to give an instruction that unless plaintiff proved his case by a preponderance of the evidence, that if the evidence was evenly balanced or the jury in doubt they should find the defendant not guilty, in an action to recover damages for personal injuries, held not error where other instructions told the jury that plaintiff must prove his case by a preponderance of the evidence.

4. DAMAGES, § 120*—*when verdict for personal injuries to boy is not excessive.* Verdict for \$2,250 held not excessive, where the evidence tended to show that plaintiff, a boy eight years old at the time of the accident, was a normal healthy boy prior thereto, was found unconscious immediately after the accident and so remained for some time; that he had a swelling on his head the size of a hen's egg, bruises on his nose and a slight hemorrhage from the nostrils; chest and knees bruised and latter swollen; that he vomited a substance tinged with blood immediately after the accident, was confined to his bed for two weeks, and was out of school the same length of time, suffered with headaches and dizziness for three years after the accident and until time of trial, and by reason of the accident had become epileptic.

5. APPEAL AND ERROR, § 1094*—*when brief contains improper statements.* Charges in brief of plaintiff's counsel that defendant and certain of defendant's witnesses had suppressed facts, held unjustified and the language used unbecoming, unwarranted and undignified.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

In re Estate of August F. Roeske, Deceased.
On appeal of Bertha Gulzow (formerly Bertha Roeske), Appellant, v. Maria Fillwock et al., Appellees.

Gen. No. 21,948.

1. EXECUTORS AND ADMINISTRATORS, § 8*—*what is nature of jurisdiction of County and Probate Courts in matters of administration.* County and Probate Courts are courts of general and unlimited jurisdiction in matters of administration, and exercise an equitable jurisdiction adapted to their organization and modes of procedure.

2. EXECUTORS AND ADMINISTRATORS, § 8*—*when order allowing or disallowing claim may be set aside.* County and Probate Courts in the exercise of their equitable jurisdiction in matters of administration may, on motion at a subsequent term, set aside an order allowing or disallowing a claim against an estate where fraud or mistake has intervened.

3. EXECUTORS AND ADMINISTRATORS, § 552*—*when presumed evidence was sufficient to establish fraud in allowance of child's award in account of executrix.* Where the Circuit Court, on appeal from an order of approval by the Probate Court of an executrix's final account, found a certain child's award mentioned in such account was excessive and ordered that it be set aside and a new award made, held in the absence of a bill of exceptions, that it would be presumed that there was evidence before the trial judge on such appeal tending to establish fraud or mistake in the allowance of such award so as to give the court jurisdiction to set the award aside.

4. EXECUTORS AND ADMINISTRATORS, § 552*—*when presumed that necessary steps were had in Circuit Court against executrix failing to account for assets.* Where the Circuit Court, on appeal from an order of approval by the Probate Court of an executrix's final account, found certain assets unaccounted for and ordered the executrix to account for same, held that while an executrix who conceals assets may be proceeded against by citation under Rev. St. ch. 3, secs. 81, 82 (J. & A. ¶¶ 130, 131), such was not the only remedy, and on appeal from the judgment of the Circuit Court it would be presumed the necessary steps were had in that court in the absence of a bill of exceptions.

5. COURTS, § 104*—*when Probate Court has jurisdiction.* Where it is claimed that the representative of an estate has property be-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

longing to the estate which is claimed by such representative individually, the Probate Court has ample authority to determine the ownership of the property, and it is not necessary that a separate suit be brought.

6. COURTS, § 104*—*when Probate Court has no jurisdiction.* 'The Probate Court has no jurisdiction to determine the ownership of property where the proceeding is between the representative of an estate on the one side and third persons on the other.

7. PLEADING, § 3*—*when formal pleadings not required.* No formal pleadings are required in the Probate Court.

8. EXECUTORS AND ADMINISTRATORS, § 556*—*when case tried de novo on appeal.* On appeal to the Circuit Court from an order of approval by the Probate Court of an executrix's final account, the case is tried *de novo*.

9. EXECUTORS AND ADMINISTRATORS, § 552*—*when presumed that sufficient showing was made that appellees were interested in subject-matter of proceeding.* In the absence of a bill of exceptions on appeal from a judgment of the Circuit Court trying an appeal from an order of approval by the Probate Court of an executrix's final account entered in the administration of an estate, *held* that it would be presumed that there was sufficient showing made that appellees were interested in the subject-matter of the proceeding.

Appeal from the Circuit Court of Cook county; the Hon. ADELOR J. PETIT, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 18, 1917.

RUDOLPH H. WOLLNER and CHARLES LEVITON, for appellant.

FRANCIS E. CROARKIN, for appellees.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

This is an appeal by the executrix of the estate of August F. Roeske, deceased, from a judgment entered in the Circuit Court of Cook county.

It appears that the executrix filed her amended final account in the Probate Court of Cook county, and that the same was approved. From such order of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Gulzow v. Fillwock, 205 Ill. App. 366.

approval, appellees prosecuted an appeal to the Circuit Court of Cook county. The matter there came on for hearing upon a stipulation of the parties, and testimony heard in open court. The Circuit Court found that it had jurisdiction of the parties and subject-matter, and as to the objections filed to appellant's amended final account, the court further found that there was \$300 deposited in the Hibernian Bank of Chicago, in the name of Bertha Roeske individually, which was the property of and belonged to August F. Roeske, deceased, at the time of his death. The court further found that \$500, which was loaned to certain persons about three years before the death of August Roeske, was the property of August F. Roeske, and belonged to him at the time of his death; and it was ordered that the executrix account for the \$300 and \$500 not accounted for in the final account. The court further found that the child's award of \$1,000 mentioned in the executrix's final account was excessive and ordered that it be set aside and a new award made.

Appellant contends that the Circuit Court had no authority to set aside the child's award for the reason that the award is a judgment in favor of the child, and is similar to the allowance of a claim of the second class, and, as no appeal was taken from the order of allowance, the court was therefore without jurisdiction.

"County and Probate Courts are courts of general and unlimited jurisdiction in matters of administration, and exercise an equitable jurisdiction adapted to their organization and modes of procedure, and in the exercise of such equitable jurisdiction may, on motion at a subsequent term, set aside an order allowing or disallowing a claim against an estate, where fraud or mistake has intervened." *Tisdale v. Davis*, 198 Ill. App. 116; *Schlink v. Maxton*, 153 Ill. 447;

Sherman v. Whiteside, 190 Ill. 576; *Heppe v. Szczepanski*, 209 Ill. 88; *Whittemore v. Coleman*, 239 Ill. 450; *Marshall v. Coleman*, 187 Ill. 556; *Domitski v. American Linseed Co.*, 221 Ill. 161; *Ford v. First Nat. Bank*, 201 Ill. 120.

In the *Marshall* case, *supra*, where it appeared claims had been allowed and subsequently when the final report came on for approval objections were made to such allowances, the court held the objections were made in apt time. It was there said (p. 570): "We are, accordingly, of the opinion that, as the estate of the deceased, Edward B. Goodner, was not closed, the County Court of Marion county had a right, when appellant's final report was presented for approval, to hear testimony for the purpose of contradicting and surcharging his former reports and accounts as administrator, and to surcharge and correct the same, if the testimony so introduced justified such action."

There is no bill of exceptions in the record in this case. We have, therefore, no means of ascertaining what evidence was produced before the Circuit Court. Every intendment is in favor of the validity of the judgment, and we must therefore presume that the court heard sufficient evidence to authorize the entering of the judgment. Under this rule, we must presume that there was evidence before the trial judge tending to establish fraud or mistake in the allowance of the child's award, and therefore the court had jurisdiction to set the award aside.

The appellant further contends that the Circuit Court had no jurisdiction to order the executrix to account for the \$300 and \$500 above mentioned; that the proper procedure where the executrix conceals assets is a proceeding for citation under sections 81 and 82, chapter 3, Revised Statutes (J. & A. ¶¶ 130, 131), and not by filing objections to the final account,

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and that where the executrix has disclosed assets but claims them as her own, then sections 81 and 82 are inapplicable, and the proper method is by a bill in equity. It is true that when an executrix conceals the assets she may be proceeded against under sections 81 and 82, but this is not the only remedy (*Simms v. Guess*, 52 Ill. App. 543), and, in the absence of a bill of exceptions, we must presume that the necessary steps were had in the trial court. In the *Marshall* case, *supra*, it was held that the account of an administrator could be surcharged and corrected upon the filing of the final account, and, as above stated, we must presume that objections were made to the final account that it did not include therein the \$300 and \$500, and the Probate Court overruled these objections and approved the account, from which appeal was taken, and the Circuit Court therefore had jurisdiction of the matter.

Where it is claimed that the representative of an estate has property belonging to the estate, which is claimed by such representative individually, the Probate Court has ample authority to determine the ownership of the property, and it is not necessary that a separate suit be brought. *Martin v. Martin*, 170 Ill. 18; *Dinsmoor v. Bressler*, 164 Ill. 211; *Platt v. Williams*, 175 Ill. App. 1; *Rone v. Robinson*, 188 Ill. App. 438. But the Probate Court has no jurisdiction to determine the ownership of property where the proceeding is between the representative of an estate on the one side and third persons on the other. *Dinsmoor v. Bressler*, *supra*; *Moore v. Branderburg*, 248 Ill. 240. In the case at bar, the contention is that the \$300 and \$500, claimed by the executrix individually, in fact belonged to the estate. She could not, therefore, as executrix, proceed against herself individually. As was said in the *Martin* case, p. 29: "In this case the plaintiff in error, who was proceeded against,

is one of the executors, and could not be both plaintiff and defendant in a suit at law. If she held property, claiming the same as her own, which belonged to the estate being administered under the jurisdiction of the County Court, and of which she was one of the executors, the relation afforded ground for an equitable proceeding against her. It is one of the cases where the court may properly order a surrender of property, and enforce a duty owing by the trustee in the manner provided by the statute."

Appellant also contends that the Circuit Court had no jurisdiction, because there is no showing that appellees had any interest in the subject-matter. Section 24, chapter 3, Revised Statutes (J. & A. ¶ 73), provides that appeals may be taken from all judgments or orders of the County or Probate Courts by any person who may consider himself aggrieved by the judgment or order. No formal pleadings are required in the Probate Court, and, on appeal to the Circuit Court, the trial is *de novo*. Under the rule above stated, we must presume that there was sufficient showing made that appellees were interested in the subject-matter.

Finding no reversible error in the record, the judgment of the Circuit Court of Cook county is affirmed.

Affirmed.

Breslauer v. S. Franklin & Co. et al., 205 Ill. App. 372.

Edward H. Breslauer, Appellee, v. S. Franklin & Company, Samuel Franklin and Fred J. Abrams, Appellants.

Gen. No. 22,002.

1. MANDAMUS, § 179*—*when petition of to compel allowance of inspection of books of corporation by stockholder is sufficient.* A petition for mandamus to compel the respondent corporation and its officers to allow petitioner as a stockholder in the corporation to examine its books and records, alleging that the corporation had its principal place of business in Chicago; that certain of the respondents were its president and secretary, respectively; that petitioner appointed an agent or attorney and requested the corporation, its officers and directors to permit petitioner's representative to examine its books and records, and that the request was denied, *held* to be sufficient.

2. CORPORATIONS, § 179*—*when stockholder may enforce right of inspection of books.* The right of a stockholder to examine the books and records of the corporation may be enforced by mandamus against it and its officers if such right is denied.

3. MANDAMUS, § 122*—*who is proper party respondent.* The corporation is properly joined as a party respondent in a petition for mandamus to enforce the petitioner's right as a stockholder to examine the corporation books and records.

4. CORPORATIONS, § 178*—*what time allowed to stockholder to examine books within mandamus order.* An order awarding a writ of mandamus to a petitioner to examine the books and records of a corporation of which he is a stockholder "during business hours," *held* not to mean that such examination be carried on throughout the entire business day, but during business hours and not in the nighttime.

Appeal from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 18, 1917.

H. C. LEVINSON and LEO W. HOFFMAN, for appellants; MAX DANIELS, of counsel.

LEO KORETZ and S. J. RICHMAN, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

This is an appeal from a judgment of the Circuit Court of Cook county, awarding a peremptory writ of mandamus against the appellants, S. Franklin & Company, a corporation, and its president and secretary, commanding them and each of them to forthwith permit the appellee, or his duly-authorized agent or attorney, to examine the corporate records and books of appellant, S. Franklin & Company, during business hours on any business day. Appellee was a stockholder in the corporation, and prior to the filing of the petition he made a written request upon the company and its officers and board of directors to permit him, by his agent, to make an examination of the books. The request being denied, appellee applied for a peremptory writ of mandamus. Section 13, chapter 32, Revised Statutes (J. & A. ¶ 2430) confers upon a stockholder of a corporation the right to inspect the corporate books and records. *Venner v. Chicago City Ry. Co.*, 246 Ill. 170; *Stone v. Kellogg*, 165 Ill. 192.

Appellants contend that the petition is insufficient, in that it does not allege that the appellants are directors or trustees of the corporation, and does not set forth any legal duty upon the appellants to keep corporate records, and further that the petition fails to show that there are any books or records belonging to the corporation, or, that if such books and records were in existence, that they were in the custody or control of the appellants. The statute requires the directors or trustees of every corporation to cause to be kept at its principal place of business corporate books and records. The petition alleges that the corporation has its principal place of business in Chicago; that appellants, Franklin and Abrams, are its president and secretary, respectively; that appellee appointed an agent or attorney and re-

Breslauer v. S. Franklin & Co. et al., 205 Ill. App. 372.

requested the corporation, its officers and board of directors to permit his representative to examine the books and that the request was denied. The statute provides that a stockholder shall have the right at all reasonable times by himself or attorney to examine the books of the corporation. We think the petition is sufficient.

Appellants further contend that the corporation is not a proper party defendant, in that the statute makes it the duty of the directors or trustees to keep the books, and that the writ should run against the parties having the custody of the books. The right of a stockholder to examine the books and records may be enforced against the corporation and its officers if such right is denied. We think the corporation was properly joined as a defendant. *Crown Coal & Tow Co. v. Thomas*, 60 Ill. App. 234; *People v. Weber Co.*, 159 Ill. App. 588; *Maremont v. Old Colony Life Ins. Co.*, 189 Ill. App. 231.

Complaint is also made that the order awarding the writ is broader than that authorized by the statute; that the statute provides that books of account may be examined "at all reasonable times," while the order provides that the examination of the books be made "during business hours on any business day, upon request made by the petitioner," and to continue from day to day until completed; that this is not an examination at all reasonable times as authorized. We think there is no merit in this objection. The order provides that the examination be conducted during business hours. This does not mean that such examination be carried on throughout the entire business day, but it was intended that the examination be not conducted in the nighttime, but only during business hours.

The judgment of the Circuit Court of Cook county is affirmed.

Affirmed.

Paul E. Gierz, Appellee, v. John Rus and Peter Soukup, Appellants.

Gen. No. 22,042. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed April 18, 1917.

Statement of the Case.

Action by Paul E. Gierz, plaintiff, against John Rus and Peter Soukup, defendants, to recover on an appeal bond. From a judgment for plaintiff for \$1,000 damages, defendants appeal.

EDWARD J. HERDLICKA, for appellants.

EDWARD J. GREEN, for appellee.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. JUDGMENT, § 252*—*what amendments may be made after term.* After the expiration of the term at which a judgment has been entered it can be amended only in matters of form.

2. APPEAL AND ERROR, § 1887*—*what are requisites of judgment in action on appeal bond.* In an action of debt on an appeal bond, the judgment should specify the amount of the debt and damages and should be rendered for the debt to be satisfied upon payment of the damages.

3. APPEAL AND ERROR, § 1887*—*what amendment to judgment on appeal bond may not be made after term.* In an action of debt on an appeal bond where judgment was entered upon a finding for the plaintiff and assessment of damages in a certain sum, and after expiration of the term at which the judgment was entered and approval and filing of an appeal bond the court, on motion, entered

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Klantz v. Marx, 205 Ill. App. 376.

a judgment purporting to correct the former judgment in form for incorrect transcription thereof by the clerk of the court, and finding amount of debt and of damages and adjudging recovery of such debt and damages, with costs, *held* that such amendment was one of substance and not of form and the court was without power to make same.

4. APPEAL AND ERROR—*when proper judgment cannot be entered on appeal in action on appeal bond.* Where the evidence was not preserved in the record by bill of exceptions, *held* that there was no way of ascertaining the amount of damages, in an action to recover on an appeal bond, and proper judgment could not be entered on an appeal.

Anatole Klantz, Appellant, v. Walter Z. Marx et al.,
Appellees.

Gen. No. 21,831. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed April 18, 1917.

Statement of the Case.

Bill by Anatole Klantz, complainant, against Walter Z. Marx, Zero Marx, Reuben H. Donnelley and Chicago Telephone Company, defendants, charging defendants Marx with the wrongful use of the trade name "Zero Marx Sign Works" and with unfair competition in trade, and asking an injunction against all defendants as to using such trade name or one similar thereto. From a decree dismissing the bill, on demurrer, complainant appeals.

LOESCH, SCOFIELD & LOESCH, for appellant.

CHARLES E. SELLECK, for appellees.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. TRADE-MARKS AND TRADE NAMES, § 26*—*when right to use purchased trade name of bankrupt must be determined in court of bankruptcy.* Where a bankruptcy court through its receiver sold the tangible assets of a bankrupt corporation, together with its good will and right to use its trade name, the determination of the question whether the value of the right to use such name depended on continuous usage, *held* to be a matter to be determined by that court, and not collaterally in a suit brought by the purchaser of such right at such sale against parties charged with infringement and unfair use of the name.

2. BANKRUPTCY, § 30*—*when sale made without authority may be validated by confirmation.* A bankruptcy court having power to order a sale of intangible property may, by confirmation of a sale made by a receiver without a prior order, ratify and validate the sale, the confirmation being equivalent to a prior order.

3. TRADE-MARKS AND TRADE NAMES, § 24*—*what constitutes unfair competition in trade.* The use by defendants of the words "Zero Marx Signs" and "Marx Zero Signs" in a telephone directory, and solicitation by them of business by representing they were successors in business of a corporation bearing the name "Zero Marx Sign Works," *held* to be unfair competition in trade against complainant as purchaser at a receiver's sale in a bankruptcy court of the right to use the name of said corporation, in a suit for infringement and unfair use of such name.

4. TRADE-MARKS AND TRADE NAMES, § 14*—*right of purchaser to use trade name.* A trade name is an asset which may lawfully be sold and the purchaser has the right to use it.

5. TRADE-MARKS AND TRADE NAMES, § 10*—*what is effect of use of trade name by purchaser.* The use of a trade name by the purchaser of the right to use same is not a representation that the purchaser is the identical person who formerly used it, but merely that he has the right to do business under that name.

6. TRADE-MARKS AND TRADE NAMES, § 26*—*when bill for injunction against use of trade name is sufficient.* A bill for an injunction setting up complainant's purchase of the right to use a certain trade name and the use by defendants in their business of a similar name with representations that they were successors to the original user of the name, *held* to state grounds for relief in a court of chancery.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

McGowan v. Chicago City Railway Co., 205 Ill. App. 378.

**Edward McGowan, by Patrick H. McGowan, Appellee,
v. Chicago City Railway Company, Appellant.**

Gen. No. 21,846. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. RICHARD E. BURKE, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed April 18, 1917.

Statement of the Case.

Action by Edward McGowan, by Patrick H. McGowan, his father and next friend, plaintiff, against the Chicago City Railway Company, defendant, to recover damages for personal injuries sustained by being struck by one of defendant's street cars. From a judgment for plaintiff for \$2,000, defendant appeals.

FRANKLIN B. HUSSEY and WATSON J. FERRY, for appellant; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

LITZINGER, MCGURN & REID, for appellee; EDWARD B. LITZINGER, of counsel.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. STREET RAILROADS, § 53*—*what does not constitute use of cars on street railway within fender ordinance.* Where plaintiff was injured by certain dismantled and discarded summer street cars belonging to defendant while such cars were being moved from certain temporary tracks to defendant's car barns, *held* that such use of the cars by defendant was not within the term "each and every car used on such street railway," used in an ordinance providing that "every person or corporation controlling any street

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ed. C. Smith Furniture Co. v. Peter & Volz, 205 Ill. App. 379.

railway in the City of Chicago shall equip and provide each and every car used on such street railway with fenders," etc.

2. STREET RAILROADS, § 131*—*when evidence is insufficient to show wanton and wilful misconduct in injuring person crossing street car track.* Evidence held insufficient to warrant finding that certain cars of defendant were being pushed along the track at an excessive rate of speed, or that defendant's servants were so conducting the moving of the cars as to constitute wilful and wanton misconduct, under a count of a declaration charging defendant with wilful and wanton injury to a person crossing the street car tracks.

Ed. C. Smith Furniture Company, Appellee, v. Peter & Volz, Appellants.

Gen. No. 21,854. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. J. J. COOKE, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 18, 1917. Rehearing denied May 3, 1917.

Statement of the Case.

Action by Ed. C. Smith Furniture Company, plaintiff, against Peter & Volz, defendants, to recover damages for breach of contract for the exclusive agency for the sale of defendants' school furniture in Harris county, Texas. From a judgment for plaintiff for \$274, defendants appeal.

WALLACE E. SHIRRA, for appellants.

GUSTAV E. BEERLY, for appellee.

MR. JUSTICE GOODWIN delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ed. C. Smith Furniture Co. v. Peter & Volz, 205 Ill. App. 379.

Abstract of the Decision.

1. **PRINCIPAL AND AGENT**—*what is competent evidence of knowledge by principal of invasion of exclusive territory.* In an action to recover damages for breach of a contract giving plaintiff exclusive agency for the sale of defendants' goods in a certain territory, a telegram by plaintiff to defendants stating that a certain party was selling samples of the goods in such territory and that plaintiff would expect protection, *held* to be competent evidence that defendants had notice of the activities of such party.

2. **DAMAGES, § 66***—*what is measure of for breach of contract for exclusive agency.* In an action to recover damages for breach of a contract giving plaintiff the exclusive agency for the sale of defendants' goods in a certain territory, the value of the contracts lost to plaintiff by the breach, *held* to be the measure of damages.

3. **INSTRUCTIONS, § 98***—*when proper on weight given testimony of interested party.* An instruction that in weighing the testimony of one of the parties to the action the jury have the right to take into consideration the fact that he was a party to and interested in the result of the action, *held* proper where the other party to the action had not testified.

4. **PRINCIPAL AND AGENT**—*what constitutes binding contract of exclusive agency for sale of goods.* An offer by plaintiff to sell defendants' goods if given an exclusive agency for a certain territory and defendants' written acceptance of such offer, and the purchase by plaintiff of such goods and plaintiff's efforts in promoting their sale, *held* to create a binding and enforceable contract, in an action to recover damages for a breach of such contract.

5. **DAMAGES, § 179***—*what is competent evidence in action by agent for breach of contract of exclusive agency.* In an action to recover damages for the breach of a contract giving plaintiff the exclusive agency for the sale of defendants' goods in a certain territory, the price lists of defendants, the amount of plaintiff's bid on a certain prospective sale of such goods, and a computation as to the net cost of their delivery on such sale, *held* competent evidence and a proper basis for computing plaintiff's damages.

6. **EVIDENCE, § 128***—*when copy of telegram is admissible.* A copy of a telegram is admissible upon accounting for the destruction of the original telegram.

7. **EVIDENCE, § 114***—*what is best evidence of contents of telegram.* The original telegram filed with a telegraph company is the best evidence of its contents.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Frank M. McKey, Trustee, Appellee, v. Francis Cropper Company, Appellant.

Gen. No. 21,871. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. A. D. WEBB, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 18, 1917.

Statement of the Case.

Action by Frank M. McKey, trustee in bankruptcy of the estate of Aamax Cabinet Company, plaintiff, against Francis Cropper Company, defendant, to recover damages for breach of contract for the manufacture of 5,000 cabinets for defendant. From a judgment for plaintiff for \$400, defendant appeals.

BRYAN, McCORMICK & WILBER, for appellant; WILLIAM E. BRYAN, of counsel.

PAUL HUXMANN and VOSE & PAGE, for appellee.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 340*—*when question whether boxes manufactured are in accordance with contract is for jury.* The question whether certain boxes manufactured under a contract with the defendant were in accordance with the terms of the contract, held to be one for the jury, who had opportunity to examine the sample referred to in the contract and the one offered in evidence, in an action to recover damages for breach of the contract by defendant's refusal to accept the boxes.

2. SALES, § 340*—*what are questions for jury in action for damages for refusal to accept goods.* The question whether defendant by its actions had prevented the completion of certain boxes man-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Barnett v. Stanton et al., 205 Ill. App. 382.

ufactured for it by plaintiff at the time stipulated in their contract, and, if not, whether it had waived such provision of the contract, held to be for the jury, in an action to recover damages for breach of the contract by defendant's refusal to accept any of the boxes.

3. SALES, § 341*—*when evidence is sufficient to sustain finding in favor of plaintiff in action for refusal to accept goods.* A finding for plaintiff, in an action to recover damages for breach of contract by defendant's refusal to accept certain boxes manufactured for defendant, under the contract, upon the question whether defendant had prevented completion of the boxes at the time stipulated in the contract, and, if not, whether defendant had waived such provision, held not manifestly against the weight of the evidence.

4. SALES, § 344*—*when evidence is sufficient to sustain verdict for damages for refusal to accept goods.* Evidence held sufficient to sustain a verdict of \$400 damages, in an action to recover damages for defendant's breach of contract by refusing to accept certain boxes manufactured for it under the contract, plaintiff having substantially completed a certain quantity of the boxes for which it would have been entitled under the contract to \$550, and certain other boxes being in various stages of manufacture.

Samuel Barnett, Appellee, v. Thomas Stanton and Jacob Feder, Appellants.

Gen. No. 21,892. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. P. B. FLANNAGAN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 18, 1917.

Statement of the Case.

Action by Samuel Barnett, plaintiff, against Thomas Stanton and Jacob Feder, defendants, to recover damages on account of defendants' failure to perform a certain written contract whereby plaintiff agreed to purchase and defendants to sell certain real estate for

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

the sum of \$8,900. From a judgment for plaintiff, defendants appeal.

BARNHARDT & STAFFORD and C. D. LEE, for appellants.

SONNENSCHN, BERKSON & FISHELL, for appellee.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. VENDOR AND PURCHASER, § 352*—*when parol evidence is inadmissible to vary contract.* Where a contract for the sale and purchase of certain real estate was by its terms to be held by a certain third party therein named and permanently retained by him after consummation of the sale, and who was directed therein to apply the earnest money paid, if same should be retained as therein provided, in a specified manner, evidence that it was not the intention of the parties that the contract should be binding until certain information had been received by one of them, *held* inadmissible, in an action to recover damages for breach of such contract, as varying its terms by a parol agreement.

2. VENDOR AND PURCHASER, § 351*—*what evidence is inadmissible under affidavit of merits in action for damages for refusal to sell property.* In an action to recover damages for defendants' breach of a contract with plaintiff for the sale by defendants to plaintiff of certain real estate, where defendants' affidavit of merits stated plaintiff had not done and performed everything required of him by the contract and had not been ready, willing and able to pay defendants any balance of the purchase price or tendered any purchase price, evidence that plaintiff refused to take the property on account of the amount of special assessments due, *held* to be evidence of an anticipatory breach not covered by said affidavit and properly excluded.

3. TRIAL, § 91*—*when exclusion of evidence is proper.* Where objection to a question was withdrawn and the party's attorney stated that the evidence simply should not be stricken out and the witness was allowed to answer, *held* that there was no assignable error in the court excluding the evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Barnett v. Feder et al., 205 Ill. App. 384.

4. **APPEAL AND ERROR**—*when discussion of evidence is harmless error.* Discussion in the presence of the jury with reference to the admission of certain evidence which was properly excluded, held not to be prejudicial.

5. **MUNICIPAL COURT OF CHICAGO, § 4***—*when judge of County Court may preside.* Under the Municipal Court Act, the judge of a County Court may preside in the Municipal Court.

Samuel Barnett, Appellee, v. Jacob Feder and Thomas Stanton, Appellants.

Gen. No. 21,901. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. P. B. FLANAGAN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 18, 1917.

Statement of the Case.

Action by Samuel Barnett, plaintiff, against Jacob Feder and Thomas Stanton, defendants, to recover damages for defendants' failure to perform a certain contract whereby plaintiff agreed to purchase and defendants to sell certain real estate for the sum of \$8,900. From a judgment for plaintiff, defendant Jacob Feder separately appeals.

This being the same action as *Barnett v. Stanton*, ante, p. 382, opinion in which was filed the same day, for the reasons therein stated the judgment is affirmed.

C. D. LEE, for appellants.

SONNENSCHN, BERKSON & FISHELL, for appellee.

MR. JUSTICE GOODWIN delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Elizabeth Stanton, Appellee, v. Chicago City Railway Company, Appellant.**Gen. No. 21,434. (Not to be reported in full.)**

Appeal from the Circuit Court of Cook county; the Hon. HARRY C. MORAN, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed April 18, 1917. Rehearing denied May 3, 1917.

Statement of the Case.

Action by Elizabeth Stanton, plaintiff, against the Chicago City Railway Company, defendant, to recover damages for personal injuries sustained while plaintiff was entering defendant's street car. From a judgment for plaintiff for \$6,700, defendant appeals.

For the decision on a former appeal, see *Stanton v. Chicago City Ry. Co.*, 188 Ill. App. 502.

FRANKLIN B. HUSSEY and CHARLES LE ROY BROWN, for appellant; JOHN R. GUILLIAMS, of counsel.

JAMES C. McSHANE, for appellee.

MR. JUSTICE TAYLOR delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 1413***—*when verdict of jury not disturbed.* Where an action to recover damages for personal injuries had been tried twice, the witnesses produced at each trial were practically the same, both juries found the defendant liable, and such finding was not manifestly against the weight of the evidence, held that setting aside the verdict as to liability of the defendant would not be justified, notwithstanding the evidence might easily be held, on an independent review, to exculpate the defendant.

2. **DAMAGES, § 241***—*when verdict not disturbed as excessive.* A

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Stanton v. Chicago City Railway Co., 205 Ill. App. 385.

judgment for \$6,700 *held* not excessive, notwithstanding a verdict and judgment on a former trial for \$6,500 was held on appeal to have been excessive, the witnesses produced at each trial being practically the same, but the evidence on the second trial as to the extent of the injuries upon which the damages were based being somewhat stronger.

3. CARRIERS, § 484*—*when instruction on duty of carrier towards passengers is not erroneous.* A general broad instruction as to a carrier's duty towards passengers within the scope of the words "it does * * * undertakes to exercise the highest degree of practicable care to secure the safety of its passengers" and the words "provided, that such neglect, if any, on the part of the carrier" to exercise such care "and such care, if any, on the part of the passenger" to exercise ordinary care for his own safety "are alleged in the declaration," etc., *held*, considering all the instructions given, to furnish no basis for the claim the jury might have concluded they were warranted in basing their verdict upon any ground of negligence except that charged in the declaration.

4. CARRIERS, § 484*—*when instruction on what constitutes ordinary care is not misleading.* An instruction that ordinary care as used in instructions meant such as an ordinarily prudent person situated as plaintiff was before and at the time of injury would exercise for his or her own safety, *held* not objectionable as misleading, the jury to think that plaintiff, if she undertook voluntarily to step off the car while it was in motion, was in the exercise of ordinary care.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

George Trumbull Woodbury, Appellant, v. Ocean Accident & Guarantee Corporation, Ltd., Appellee.**Gen. No. 21,800.**

1. **INSURANCE, § 488***—*when evidence is insufficient to show justification for dispute as to right of recovery under accident policy.* Evidence held to tend strongly to show that at the time of plaintiff's accident, on account of which he brought action to recover under his accident insurance policy with the defendant, and at the time of his settlement under such policy and executing a release, there was no justification for any dispute concerning his occupation nor the amount of indemnity to which he was entitled under the policy.

2. **TRIAL, § 196***—*when direction of verdict is proper.* If either at the close of plaintiff's evidence or of all the evidence there is no evidence, or but a scintilla of evidence, tending to prove the material averments of the declaration, the jury should be directed to return a verdict for the defendant.

3. **TRIAL, § 195***—*when case should be submitted to jury.* If there is in the record any evidence from which, if it stood alone, the jury could, without acting unreasonably in the eye of the law, find that all the material averments of the declaration have been proven, the cause should be submitted to the jury, even though a verdict for the plaintiff would have to be set aside on a motion for a new trial because of the manifest preponderance of all the evidence.

4. **INSURANCE, § 490***—*when fraud and duress in procurement of release is question for jury.* Evidence of fraud and duress in the procurement by defendant's adjuster of plaintiff's release of defendant's liability under its policy of insurance issued to plaintiff, held ample to justify its submission to the jury, in an action to recover the amount of the policy.

5. **INSURANCE, § 488***—*when incapacity of insured to make settlement is question for jury.* Evidence bearing upon the physical and mental condition of plaintiff at the time he made settlement under his accident insurance policy for the results of an accident tending to show he was then incapacitated for making such settlement, held to be for the jury to pass upon.

6. **INSURANCE, § 488***—*when extent of influence of injuries on will in making settlement is for jury.* The extent of the influence of plaintiff's injuries upon his will and judgment in making a settlement under his accident insurance policy, held to be for the jury.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Woodbury v. Ocean Acc. & Guar. Corp., Ltd., 205 Ill. App. 387.

7. EVIDENCE, § 33*—*when presumed that common law is in force.* In the absence of evidence as to the law of another State, it will be assumed the common law prevailed there at the time in question.

8. SEALS, § 2*—*what is not instrument under seal.* An instrument executed with a scroll, *held* to be, at common law, not one under seal.

9. SEALS, § 6*—*what is effect of seal.* A seal, generally speaking, merely adds "factitious dignity" to a document; more conclusiveness, as mere evidence of the agreement of the parties.

10. CONFLICT OF LAWS, § 12*—*what law governs as to release.* Where a release is presented as a defense to a cause of action, the law of the place where the release was executed as to its execution should be applied.

11. INSURANCE, § 491*—*when release is not bar to action on accident policy.* Where an action was brought to recover on an accident insurance policy alleged to have been tortiously obtained from plaintiff by fraud and duress with a release of liability under the policy of the insurer obtained at the same time and under the same circumstances, the questions of defendant's guilt of such tort and, if guilty, of what damages were thereby inflicted, *held* to be not affected by the fact of such release.

Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed April 18, 1917. Rehearing denied May 9, 1917.

FREDERICK A. BROWN and RAYMOND S. PRUITT, for appellant; JOHN McDONALD, of counsel.

WILKERSON, CASSELS & POTTER, for appellee; RALPH F. POTTER and KENNETH B. HAWKINS, of counsel.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from a judgment entered by the Circuit Court of Cook county, on March 5, A. D. 1915, in favor of the Ocean Accident & Guarantee Corporation, Ltd., appellee (hereinafter designated defendant). The judgment was based on the verdict of a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

jury, directed by the trial judge, at the close of all the evidence in the case.

In the year 1908, the defendant had issued to appellant, George T. Woodbury (hereinafter designated plaintiff), an accident insurance policy, which provided, *inter alia*, for the payment of \$12,500 in case the insured lost either hand or foot solely through external, violent and accidental means. The occupation of the plaintiff was stated in the insurance policy as that of vice president of the Columbus Safe Deposit Company with the ordinary duties of office and traveling.

On October 1, 1910, the plaintiff having moved from Chicago to Phoenix, Oregon, and while the policy was still in force, received a serious injury to his right leg, through the accidental discharge of a gun, and as a result of the injury his right foot had to be amputated above the ankle.

At the time of the accident plaintiff had additional accident insurance, but for different amounts, in both the United States Casualty Company and the Continental Casualty Company. Plaintiff brought suit in the Circuit Court of Cook county on each of the accident policies, and as the material facts in each suit were substantially the same, the three suits were by agreement of counsel consolidated. Separate appeals were prayed and allowed. The plaintiff has filed a similar brief in each of the three cases; and each of the defendants (appellees) has filed a separate and different brief.

The declaration contains two counts, the first of which contains the following averments:

That on October 23, 1910, the plaintiff owned and possessed an accident policy, which provided that the defendant would pay the plaintiff \$25,000 if he should accidentally lose either foot; that on October 3, 1910, he lost his right foot by the accidental discharge of a shot gun, and the policy then had a value of \$12,500,

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but that the defendant sent an adjuster to plaintiff, while he was injured and in a weakened condition from the shock of the injury and two operations, who menaced and threatened the plaintiff that unless he would surrender the policy for the sum of \$6,250.00 in full settlement thereof, the defendant would cause plaintiff to be criminally prosecuted for intentionally having shot off his foot for the purpose of defrauding the insurance company; that he, the adjuster, told the plaintiff that he had evidence of such fact that would probably result in sending plaintiff to the penitentiary; that said statement was false; that said adjuster further stated that if he did not accept the sum of money so offered, the defendant would never pay; that it had an abundance of money to defend any suit and would keep the plaintiff in court for years and bankrupt him, and that if plaintiff succeeded in staying out of the penitentiary, he would be unable to support himself and wife because of the trouble defendant would make him; that said statements were made in the presence of plaintiff's wife, who was in a run down physical condition from nursing of plaintiff, and were made for the purpose of terrorizing her and having her influence plaintiff to accede to the demands of said adjuster; that said adjuster so terrorized them that by reason of such *menace*, threats, and in fear and apprehension thereof, *plaintiff* delivered said policy to defendant while there still remained due on said policy \$6,250, which was then and there the value of said policy.

The second count is in trover and contains the following averments:

"That on, to wit, the 23rd day of October, 1910, the defendant was lawfully possessed of the policy of insurance heretofore described, which on said date had a value of \$12,500 by reason of plaintiff having accidentally shot off his foot, which policy was lost by the plaintiff and came into the possession of the defendant, who, knowing it to belong to the plaintiff, nevertheless converted the same to its own use and refused to deliver it to the plaintiff, though often requested so

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to do and disposed of the same to the damage of the plaintiff in the sum of \$10,000."

To the declaration, the defendant filed a plea of the general issue, and also a special plea, setting forth that after the occurrence of the acts alleged in said declaration, plaintiff executed a release under seal, discharging the defendant from all claims. To the latter's special plea the plaintiff filed a general replication.

The case was tried before a jury, and at the close of all the evidence, the plaintiff's and the defendant's, upon a motion of the defendant, the court instructed the jury to find the defendant not guilty.

It was expressly admitted by the defendant upon the trial that on October 3, 1910, plaintiff suffered the loss of his right foot, solely through external, violent and accidental means; that due proofs of loss were furnished, as required by the policy in question, and that said policy was in force and effect at the time said loss occurred.

The plaintiff contends that the defendant, through its adjuster, obtained the said policy from the plaintiff by fraud and duress, and caused the plaintiff to surrender it for one-half its value.

The defendant contends: (1) That on account of an alleged change in the insured's occupation to a more hazardous risk, the defendant was liable only for the amount of indemnity the premium paid by the insured would purchase in the more hazardous classification, and that the defendant did not pay that amount; that because of the dispute as to plaintiff's occupation the claim was unliquidated, and the settlement and release were supported by a good consideration, and the plaintiff was barred from his action at law; (2) that no fraud or duress were shown in obtaining the policy from the plaintiff, and the court rightly directed a verdict; (3) that the release, being under seal, could not be attacked in an action at law.

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We shall consider those contentions *seriatim*.

As to the alleged change in the occupation of the plaintiff: At the time the plaintiff took out the insurance he was employed by the Columbus Memorial Building, and had been for about eighteen years, as renting agent. On June 10, 1910, he went to Phoenix, Oregon, where his father-in-law lived, to go into the ranch business. The plaintiff himself testified that six or eight weeks after his arrival in Oregon he gave up the idea of going into the ranch business and went into the real estate business at Medford, Oregon, where he claims he had desk room; that he had quite a list of property for sale; that he had some real estate for sale for one Wilber, in Ashland; that after he went into the real estate business he was not directly interested in the ranch, though he did some chores; that he was not in any other business than that of real estate after September 1, 1910, and at the time of the accident; that on the day of the accident he had made all preparations to go east, grip packed, money in his pocket, contract for the commissions he was to receive, signed up, etc.

The testimony of E. J. Wilber is also to the effect that the plaintiff was engaged in the real estate business a month or so prior to October 1, 1910, the date of the accident; that plaintiff's office was in Medford, and that on October 1, 1910, the plaintiff and he were interested in selling a subdivision of 1,800 acres of land, and on that day Wilber himself took some plats, blue prints, maps and other data, to the plaintiff's house. The plaintiff's father-in-law, C. S. Redfield, testified that the agreement between plaintiff and Wilber was signed just before the accident happened.

The testimony of the defendant's chief witness, Wisner, the adjuster, also, in a measure corroborates the testimony of plaintiff and Wilber. He testified that the plaintiff showed him a receipt for \$10 from Mr. Patterson, for use of his desk; that his recollec-

tion was that the receipt was for the month of September; that when he talked with Wilber, the latter pointed out a tract of land and said that he had made arrangements with the plaintiff to go to Chicago and interest his friends; that the plaintiff had gone into the real estate business with him.

Plaintiff's exhibit 9 shows a letter head, which the plaintiff testified was used by him when he engaged in the real estate business. It is as follows:

"G. T. Woodbury,
Fruit and Timber Lands,
Medford, Oregon."

On August 20, 1910, the plaintiff wrote a letter to the defendant company, stating that he had made arrangements to move to Medford and go into the real estate business on September 1st, and requesting advice as to what would be necessary for him in regard to his insurance. On August 24, 1910, the defendant company answered plaintiff's letter (in part) as follows: "Your kind favor of August 20th at hand, and your new occupation will not necessitate any change in your policy."

It seems impossible to consider the testimony of the plaintiff and Wilber, and the admission of the defendant's witness, the adjuster, in regard to the receipt from Patterson, and the answer of August 24, 1910, of the defendant company, that the new occupation would not necessitate any change in his policy, without concluding that there was evidence that tended strongly to prove that there was no reasonable dispute of any kind as to the occupation of the plaintiff; and that, as far as the defendant was concerned, no change had taken place in occupation or risk to justify any dispute or contention on the part of the defendant that the claim of the plaintiff was unliquidated. The evidence that he was in the real estate business at the time of the accident was quite overwhelming. The tes-

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timony of the neighbors who were called, and knew generally what he did about his wife's ranch, is, on the whole, entirely consistent with the testimony of both the adjuster and Wilber on that subject.

We are bound to assume, therefore, that the evidence tends strongly to show that at the time of the accident and at the time of the settlement there was no justification for any dispute concerning the occupation of the plaintiff, nor the amount of indemnity to which he was entitled.

As to the alleged fraud or duress in obtaining the policy from the plaintiff, and making a settlement:

It may be well (1) to consider the evidence as to the physical and mental condition of the plaintiff at the time of the settlement; and then (2) the evidence as to the alleged threats and intimidation and representations of the adjuster.

As to the physical and mental condition of the plaintiff: On October 1, 1910, between 2:00 and 3:00 p. m., the plaintiff went out to a tool house, which was about 150 feet from the rear of the main house, and reached up for his rifle. It got away from his hands, struck the door and dropped muzzle down, and then fell over, and, as it did so, it went off, the bullet going transversely through his right leg about three inches above the ankle. In about half an hour Dr. Malmgren arrived, and the plaintiff was put on a stretcher, his wound dressed, and he was taken in a wagon to a hospital at Medford, where he arrived, after intense suffering, about 6:00 o'clock p. m. He was given an anesthetic and three inches of the bones were taken out. The bullet, which was a soft nose bullet, had entered from the inside of the leg and had cut in two, transversely, both the tibia and fibula. The first operation was a wiring of the severed ends of both those bones. There were a great many loose fragments of bone in the wound. Dr. Malmgren testi-

fied that the bullet by its circular motion had ground up the bones and that it took half an hour to clean out the bone; that it bled quite freely and the plaintiff suffered intensely. Forty-eight hours afterwards, on October 3, 1910, the circulation after the first operation being very poor, amputation was performed. The evidence of the doctors and of the plaintiff is that the injury and the operations caused a considerable loss of blood and a great amount of suffering.

The plaintiff testified that after the accident, while on the way to the hospital, and at the hospital, he lost two or three quarts of blood; that at the first operation they took out three inches of bone; that he was hardly out from under the influence of one anesthetic when they put him under another; that he did not remember much that happened in between the two; that the second operation was performed at 2:00 p. m. on Monday, October 3, 1910; that after the second operation "the chloroform nauseated me, and my weakened condition made me weaker. It was a long time before I could take anything on my stomach, due to the effects of the chloroform"; that his wife and trained nurses took care of him; that after the amputation the wound was dressed "very frequently," they would undo it and see the condition it was in and then do it up again and put on fresh bandages"; that they put surgeon's plaster on to hold it together; that when they would remove them it was very painful; that pus was present, and a drainage tube kept in for some time; "that several times the pieces of bone that they had been unable to remove, worked out to the surface, and there was one or two that broke out, and other times they would cut in and dig them out"; that "it was at least five months before the last one came out"; that after he had been at the hospital several weeks, owing to the fact that it was crowded, he was taken to the physician's house, where he could receive attention; that

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"the doctor was there and dressed the wound the day that this settlement was made"; that he remained at that doctor's house three or four weeks, after being three weeks at the hospital; that he was nursed at the doctor's house by his wife; that the doctors called every day; that he was under the care of a physician until the following March; that until then he had some fever.

As to threats, intimidations and representations of the adjuster: The plaintiff testified that Wisner, the adjuster, called on him on November 5, 1910, at the hospital; that he told him he had come out to adjust his claim; that when he left he said he wished to make some investigation and would be back again; that he came back the next morning before the plaintiff was up; that he said "he had some very suspicious evidence, some evidence which was very suspicious" regarding the accident; that he said, "it was rather unusual for a man out in the country to have so much insurance"; that in the morning and in the afternoon both, "he did talk about people going to the penitentiary where the evidence was less against them than it was against me"; that "he cited a case of a man at Buffalo who threw his arm under a street car and it was cut off. He had to sue the companies and they sent him to the penitentiary, and he cited several cases, two or three more, I can't say just where"; that when plaintiff told him that he would not settle for anything but the face value, he said "they will bankrupt you and possibly put you in the penitentiary"; that "they will ruin your reputation anyway"; that "they have unlimited funds and the best legal talent in the country, it is foolish for you to attempt to fight them"; that he, the plaintiff, told the adjuster that he was in no condition to talk the matter over; that there was time enough to settle it; that he said "it was either \$10,000 (meaning a fifty per cent.

settlement of the policies) on the one hand, or litigation on the other, with the penitentiary as the possible wind up for me"; that he said "you are very foolish if you don't accept this offer of mine. You are getting along at the time of life when it will be hard for you with only one leg to support your wife."

In the afternoon, between 2:00 and 3:00 o'clock, the adjuster visited the witness again, and stayed about an hour. Mrs. Woodbury was there, and had been present at the prior conversations. Plaintiff testified that the adjuster talked about the same thing in the afternoon as in the forenoon, "about the possibility of my going to the penitentiary, and that I hadn't a chance on earth to win a suit if I fought it"; that that night "we did not sleep a wink all night" (meaning himself and wife); that "I was greatly worried." "I was worried talking this over with my wife"; that they talked about it all night long; "I was rather run down from the loss of blood and very weak, they were trying to build me up"; that he had no appetite during the time Wisner visited him; that the wound was painful for months.

The adjuster called again on the third morning, but had to wait some minutes until the doctor got through dressing the plaintiff's wound, the plaintiff being in bed. Plaintiff testified further that the dressing of the wound that morning was painful; that the adjuster reiterated the statements about the penitentiary, "they were the things that stood out prominent, that was the thing that stood out prominent most of the time"; that that morning he finally agreed to make a settlement, and the adjuster went away and said "he would be back in the afternoon with the drafts, and that he was in a great hurry and must get right out of town"; that he came back about 2:00 o'clock with the papers ready; that the settlement was for one-half, with some addition for miscellaneous fees; that on the

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morning when the wound was dressed by the doctor and the matter finally settled, his condition was "very weak and nervous," and (referring to his wife, who had been present at all the interviews, and who he testified had lost thirty pounds), "her weakened condition induced me to make this settlement and avoid further trouble and friction"; that more than once during the several interviews he told the adjuster he was in no condition to do business; that at one of the interviews the adjuster said it was "rather peculiar that there was no witness to the accident"; that he asked him to illustrate how it happened, and the witness said he could not stand up; that Wisner then stood up in the doorway and went through the motions, and then said, "you see how ridiculous that would appear before a jury"; that Wisner convinced him, by what he said, that if he brought suit on the policies he would never get a cent; that when the adjuster threatened in case the companies were sued that they would prosecute him criminally "I did not know what they might do. Innocent men have been sent to the penitentiary"; that he believed him; that he did not read over the papers which were given him that afternoon to sign; that the adjuster took the policies away with him. The witness, Wilber, testified that he telephoned the plaintiff he was not in any condition to make a settlement. There is some evidence that the plaintiff talked with a lawyer, or some one called Judge, but it is too uncertain to justify any definite inference. Dr. Conroy testified that the plaintiff was very nervous; that the negotiations with the adjuster had a bad effect upon his mental condition and worried him a great deal. Redfield testified that he was not in a normal condition either mentally or physically.

The question arises, and it is the substantial matter upon this appeal, was there sufficient evidence tending to show fraud or duress to justify the trial judge in submitting it to the disinterested judgment of the jury.

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In determining the duty of the trial judge in such a case, the principle of law applicable is set forth quite exhaustively by Mr. Justice Scott in *Libby, McNeill & Libby v. Cook*, 222 Ill. 206, in the following language:

“In either case (meaning at the close of plaintiff’s or all the evidence), if there is no evidence, or but a scintilla of evidence, tending to prove the material averments of the declaration, the jury should be directed to return a verdict for the defendant. If, however, there is in the record any evidence from which, if it stood alone, the jury could, ‘without acting unreasonably in the eye of the law,’ find that all the material averments of the declaration had been proven, then the cause should be submitted to the jury. (*Frazer v. Howe*, 106 Ill. 563; *Simmons v. Chicago and Tomah Railroad Co.*, 110 id. 340; *Bartelott v. International Bank*, 119 id. 259; *Offutt v. Columbian Exposition*, 175 id. 472). Such evidence last mentioned fairly tends to prove all the material averments of the declaration, and such evidence, standing alone, is sufficient to sustain, warrant or support a verdict in favor of the plaintiff, even though it may be that a verdict for the plaintiff, if returned, would have to be set aside on a motion for a new trial because against the manifest preponderance of all the evidence.”

Upon an analysis of the evidence in the instant case, we find that it proves, or tends to prove, that the injury to the plaintiff was accidental; that the defendant knew that the plaintiff had not changed his occupation and was therefore entitled to \$12,500; that a settlement was made for half that sum; that the adjuster knew at the time the settlement was made, and prior thereto, that the plaintiff, by reason of two major operations within approximately a month of the date of settlement, had suffered such nervous shock and physical change that he was not in a normal condition; that while the plaintiff was in that enfeebled condition, the adjuster, representing the defendant, by insidious suggestions as to suspicious evi-

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dence and the possibility of the plaintiff going to the penitentiary, persuaded plaintiff to make a settlement for a grossly inadequate sum. The evidence tends to show that the plaintiff agreed to surrender his right to half the amount of the policy when there was no valid defense against its payment, and no consideration for its release.

In view of the evidence, which in the case of *Fraternal Army of America v. Evans*, 114 Ill. App. 578, was considered sufficient to support a verdict, we feel compelled to the conclusion that there was in this case ample evidence of fraud and duress to justify its submission to the jury.

The jury are entitled to consider, as an element in the case, the evidence which bears upon the physical and mental condition of the plaintiff at the time the settlement was made. In *Buchanan v. Sahlein*, 9 Mo. App. 552, the court uses the following significant phrases, "the will of an innocent person of common firmness," "the will of a person of ordinary courage." In the instant case, the evidence, tending to prove that the plaintiff at the time of the settlement was incapacitated, should be passed upon by the jury. The injury made an immeasurable difference to the plaintiff; it caused a permanent change in his capacity and possibilities as a man; it limited at once his scope and his future conduct; and bearing that in mind, together with the effect of the shock and pain upon his mind and upon his will, it became a proper subject for the consideration of the jury. It is safe to assume that the injury and its consequences, as they existed at the time of the settlement, lessened his will to resist suggestion and the influence of others, and enfeebled his normal power of judgment. The matter of extent was for the jury. As to the quantity, applying the principle so exhaustively expounded in *Libby, McNeill & Libby v. Cook*, *supra*, we are of the opinion that

there was plenty of evidence to justify submitting it to the disinterested judgment of the jury.

As to the release under seal being a bar to plaintiff's suit:

The release in this case was executed with a scroll which, at common law, was not recognized. No evidence as to the law of Oregon, where the instrument was signed and sealed, was offered. We assume, therefore, that the common law prevailed at the place of execution. In Oregon, it follows, the instrument would not be considered as one under seal. What effect, then, should be given it here when presented and interposed as a defense? The defendant claims that the plaintiff is without remedy at law until he has gone into equity and has the release set aside. The plaintiff contends that as it is not a sealed instrument according to the law of Oregon, where it originated, it is not such here. The question seems never to have arisen in our courts. A seal, generally speaking, merely adds "factitious dignity" to a document; "more conclusiveness, as mere evidence of the agreement of the parties." *Steele v. Curle*, 34 Ky. 381. Many cases are found where it has been determined that the *lex fori* governs the form of action, whether, for example, it shall be in assumpsit or covenant, and there is, perhaps, some justification for such law. Where, however, as here, the release is presented as a defense to a cause of action, we are inclined to agree with the court in *Waln v. Waln*, 53 N. J. L. 429, and apply the law of the place where the release was executed.

Further, it may be said that the plaintiff is not suing upon the policy, but for the tort committed in obtaining it. Two questions may be considered as involved: (1) Was the defendant guilty of a tort in obtaining the policy; (2) if guilty, what damages were thereby inflicted upon the plaintiff. These ques-

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tions are not affected by the fact that in connection with, and as a part of the tort, a release of liability was also obtained. If the acts by which the policy was obtained were tortious, the obtaining of the release at the same time and in the same manner was equally tortious. The complaint of the plaintiff is that he has been tortiously deprived of a thing of value. The defendant replies we have a release. The plaintiff then, in effect, says, that does not make my policy valueless, for the evidence shows that the release also was obtained by the same tortious act.

After full consideration of the record in this cause, we are of the opinion that the evidence presented was amply sufficient to justify submitting it to the jury, and, therefore, we think that the court erred in directing a verdict for the appellee, and for the error so committed the judgment ought to be reversed.

Reversed and remanded.

George Trumbull Woodbury, Appellant, v. Continental Casualty Company, Appellee.

Gen. No. 21,801.

Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed April 18, 1917. Rehearing denied May 9, 1917.

FREDERICK A. BROWN and RAYMOND S. PRUITT, for appellant; JOHN G. McDONALD, of counsel.

M. P. CORNELIUS and GEORGE R. SANDERSON, for appellee; MANTON MAVERICK, of counsel.

MR. JUSTICE TAYLOR delivered the opinion of the court.

Inasmuch as this appeal involves substantially similar matters to those adjudicated in *Woodbury v. Ocean Accident & Guarantee Corporation, Ltd.*, Gen. No. 21,800, *ante*, p. 387, we are of the opinion that the court erred in directing a verdict for the appellee, and, for that error so committed, the judgment ought to be reversed and the cause remanded.

Reversed and remanded.

Woodbury v. United States Casualty Co., 205 Ill. App. 404.

George Trumbull Woodbury, Appellant, v. United States Casualty Company, Appellee.

Gen. No. 21,850. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed April 18, 1917. Rehearing denied May 9, 1917.

Statement of the Case.

Action by George Trumbull Woodbury, plaintiff, against the United States Casualty Company, a corporation, defendant, to recover on an insurance policy. From a judgment for defendant, on a directed verdict, plaintiff appeals.

The decision in this case is governed by the decision in the case of *Woodbury v. Ocean Accident & Guarantee Corporation, Ltd.*, ante, p. 387.

FREDERICK A. BROWN and RAYMOND S. PRUITT, for appellant; JOHN G. McDONALD, of counsel.

MOSES, ROSENTHAL & KENNEDY, for appellee; JOSEPH W. MOSES and WALTER BACHRACH, of counsel.

MR. JUSTICE TAYLOR delivered the opinion of the court.

**Alabama Marble Company, Appellee, v. H. L. Stevens,
Appellant.****Gen. No. 21,838. (Not to be reported in full.)**

Appeal from the Municipal Court of Chicago; the Hon. HARRY M. FISHER, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed April 18, 1917.

Statement of the Case.

Action by the Alabama Marble Company, plaintiff, against H. L. Stevens, defendant, to recover, for certain services rendered and material furnished under a written contract, a claimed balance of \$1,614.91. From a judgment for plaintiff for the amount claimed, defendant appeals.

WILKERSON, CASSELS & POTTER, for appellant.

HOYNE, O'CONNOR & IRWIN, for appellee.

MR. JUSTICE TAYLOR delivered the opinion of the court.

Abstract of the Decision.

1. CONTRACTS, § 171*—*when whole of instrument considered.* In interpreting a contract to determine the mutual obligations of the parties thereto, it is necessary to consider the whole of the contents of the instrument.

2. PRINCIPAL AND AGENT, § 169*—*when right to recover against agent is dependent upon receipt of money from principal.* Where a contract for the rendering of certain services and the furnishing of certain material by the plaintiff for the defendant as agent of the owner of a building for a certain sum to be paid by the defendant, provided further that no money should be due under the contract until the defendant had received such money from the owner, held that such provision was not a qualification or exception but an

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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inherent part of the liability, and plaintiff's right to compensation or to sue therefor was dependent upon defendant having received the money from the owner of the building.

3. PRINCIPAL AND AGENT, § 223*—*when burden is on plaintiff of proving receipt of money by agent.* In an action brought to recover under a contract for services rendered and materials furnished by the plaintiff for the defendant as agent of the owner of a building for a certain sum to be paid by the defendant, and providing that no money should be due under the contract until the defendant had received such money from the owner, where the statement of claim set up such contract and defendant's affidavit of merits set up that no money had been paid by the owner of the building, *held* that such affidavit did not set up a plea in the nature of confession and avoidance but was a direct traverse of a material part of plaintiff's cause of action, and put the burden upon plaintiff of proving that the defendant had received such money.

The People of the State of Illinois ex rel. John D. Kavanaugh, Appellee, v. City of Chicago, Appellant.

Gen. No. 21,990. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JOHN P. McGOOERY, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded with directions. Opinion filed April 18, 1917.

Statement of the Case.

Petition for writ of mandamus by the People of the State of Illinois on the relation of John D. Kavanaugh, petitioner, against the City of Chicago, respondent, for the purpose of having relator's name restored to the roster of lieutenants of the fire department. From a judgment awarding the writ, respondent appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Stone v. Janette Manufacturing Co., 205 Ill. App. 407.

SAMUEL A. ETTTELSON, for appellant; ROY S. GASKILL, of counsel.

EARL J. WALKER, for appellee.

MR. JUSTICE TAYLOR delivered the opinion of the court.

Abstract of the Decision.

CIVIL SERVICE, § 28*—*when demurrer to petition of mandamus on ground of laches is properly sustained.* In mandamus proceedings against a city, brought by a lieutenant of the fire department to have his name restored to the roster from which it had been dropped, where the original petition, which was filed nearly nine years later, failed to state any facts excusing the delay in the filing of the petition, *held* that the demurrer to the petition on the ground of laches was improperly overruled.

Isadore H. Stone, Appellee, v. Janette Manufacturing Company et al., Appellants.

Gen. No. 23,364. (Not to be reported in full.)

Interlocutory appeal from the Superior Court of Cook county; the Hon. MARTIN M. GRIDLEY, Judge, presiding. Heard in this court. Affirmed. Opinion filed April 23, 1917. Rehearing denied May 4, 1917.

Statement of the Case.

Bill by Isadore H. Stone, complainant, against Janette Manufacturing Company and certain stockholders of the corporation, defendants, to restrain the sale or disposition of treasury stock of the corporation. From an order denying a motion to dissolve a temporary injunction, defendants appeal.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Stone v. Janette Manufacturing Co., 205 Ill. App. 407.

LESLIE A. GILMORE, for appellants.

BERNARD J. BROWN, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 309*—*when appeal lies from order denying motion to dissolve injunction.* Under the Practice Act, sec. 123 (J. & A. ¶ 8661), entitled "An Act in relation to practice and procedure in courts of record," an interlocutory appeal lies from an order denying a motion to dissolve an injunction.

2. INJUNCTION, § 385*—*when discretion of chancellor in dissolving temporary injunction restraining sale of corporate stock not interfered with.* On an application for a temporary injunction by a minority stockholder, who charged the other stockholders with a conspiracy and combination to deprive him of his interest in the corporation and to destroy the value of his stock so as to compel him to sell at a loss, and that a resolution had been passed authorizing the issuance of treasury stock and a sale thereof at par value if such stockholders saw fit, and that such stock would be sold to the defendants and others at par, which would increase the capital stock of the corporation, and that the stock of the complainant would thereby be reduced by about one-half of its value, so that his voting power would be destroyed, and that there was no necessity for the sale of such stock as the corporation was not in need of money, and that the defendants did not intend to pay for the stock, their only purpose being to injure the value of complainant's stock and lessen his voting power, and, upon the bill, supported by affidavit, a temporary injunction restraining the sale or disposition of such treasury stock was granted, and the court subsequently denied a motion to dissolve, *held* that the exercise of the sound discretion of the chancellor would not be interfered with.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**F. J. Riley Printing Company, Appellee, v. Bissell
Laundry, Appellant.**

Gen. No. 22,874. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOHN COURTNEY, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 30, 1917.

Statement of the Case.

Action by F. J. Riley Printing Company, a corporation, plaintiff, against the Bissell Laundry, a corporation, defendant, to recover on a contract for advertising. From a judgment for plaintiff, defendant appeals.

DENNIS J. O'TOOLE, for appellant.

LAWTON & PETERSON, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 1752***—*judgment affirmed for insufficiency of abstract.* The abstract is the pleading of the parties in the Appellate Court, and if it fails to inform the court as to what the judgment was which the court is asked to reverse, such judgment will be assumed to be correct and will be affirmed.

2. **APPEAL AND ERROR, § 888***—*when abstract is insufficient.* In a case where the abstract contained the recital: "Verdict and motion for new trial. Order denying motion for new trial and judgment," held that such recital did not inform the court as to the character of either the verdict or judgment.

3. **CONTRACTS, § 338***—*what is no defense to action to recover on advertising contract.* In an action to recover for the amount due under a contract for advertising in a publication called "The

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Foy v. Chicago City Railway Co., 205 Ill. App. 410.

Hamiltonian," where the defendant claimed that it thought it was contracting for such advertising with the Hamilton Club of Chicago, *held* that as the contract was in writing, and did not purport to be with such club, the defendant could not avoid payment by claiming that it executed the contract under the impression that the money was to be paid for the benefit of a party not named in the contract.

Maude E. Foy, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 22,877. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. M. L. McKINLEY, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 30, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Maude E. Foy, plaintiff, against the Chicago City Railway Company, defendant, to recover damages for personal injuries due to being struck by one of defendant's street cars. From a judgment for plaintiff for \$5,000, defendant appeals.

BUSBY, WEBER and MILLER, ROBERT J. SLATER and ARTHUR J. DONOVAN, for appellant; JOHN R. GUILLIAMS, of counsel.

JAMES C. McSHANE, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. STREET RAILROADS, § 97*—*when pedestrian crossing tracks is not guilty of contributory negligence. A pedestrian who attempts*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Garrett v. Anglo-American Provision Co., 205 Ill. App. 411.

to cross street car tracks at a street intersection, after observing an approaching car which had turned at the terminal one block away and was proceeding on its last trip with the sign "Depot" marked on it, and knows that it is the duty of such car to stop on the same side of the intersecting street that she was proceeding along in crossing the tracks, for awaiting passengers, is not guilty of contributory negligence in attempting to cross the tracks where she was misled because the car came at a rapid rate of speed without warning that it was not going to stop for awaiting passengers.

2. DAMAGES, § 120*—*when verdict for personal injuries sustained by woman is not excessive.* A verdict for \$5,000 held not excessive, where a woman thirty-three years old, the mother of three children, was struck by a street car and knocked more than thirty feet away, was unconscious when picked up, was taken to a hospital and stayed there forty-two days, had periodical spells of unconsciousness for two or three days following the accident and was under a doctor's care all of the time, and she sustained a fracture of four ribs, an injury to the knee, a fracture of one of the bones of the pelvis and other injuries, and she was in good health and did her own housework before the accident and was in poor health afterwards and walked slightly lame.

John Garrett, Appellee, v. Anglo-American Provision Company, Appellant.

Gen. No. 22,880. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. OSCAR E. HEARD, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 30, 1917.

Statement of the Case.

Action by John Garrett, plaintiff, against the Anglo-American Provision Company, a corporation, defendant, to recover damages for personal injuries sustained as the result of the falling of a scaffold on which plaintiff was working. From a judgment for plaintiff for \$6,000, defendant appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Garrett v. Anglo-American Provision Co., 205 Ill. App. 411.

HOLT, CUTTING & SIDLEY, for appellant; CHARLES S. HOLT and EDWIN C. AUSTIN, of counsel.

JAMES C. McSHANE, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1698a*—*when error in refusal of requested instruction is waived.* A party, after the refusal of its request for an affirmative instruction upon its theory of the law, cannot ask the court to instruct negatively as to the same theory of the law, without waiving error, if any upon the prior ruling.

2. WORKMEN'S COMPENSATION ACT, § 2*—*when employee is not bound by.* Where an employer has not given or posted a notice or statement of his intention to come within the Workmen's Compensation Act, as required by paragraph c, sec. 1 of the Act (J. & A. ¶ 5449), an employee is not bound by the provisions of the act.

3. WORKMEN'S COMPENSATION ACT, § 2*—*what is purpose of provisions as to posting of statement of compensation provisions by employer.* The purpose of paragraph c, sec. 1, of the Workmen's Compensation Act of 1911 (J. & A. ¶ 5449), requiring the giving to the employee or posting of a statement of the compensation provisions of the act in the work place, is to notify employees that the employer is operating under the act, so that they can protect their interests by filing a notice with the Bureau in case such employees should elect not to work under the act.

4. WORKMEN'S COMPENSATION ACT, § 12*—*what does not constitute variance between pleading and proof.* In an action for personal injuries by an employee against his employer, where the plaintiff alleged that the defendant had elected not to come under the provisions of the Workmen's Compensation Act of 1911, and witnesses testified that no statements or notices of the compensation provision were posted about the work place, *held* that such evidence did not constitute a variance with the pleadings, as the failure to post notices was consistent with refusal to come under the act.

5. WORKMEN'S COMPENSATION ACT, § 12*—*what evidence is competent as admission that employer was not under.* In an action for personal injuries by an employee against his employer, where

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Garrett v. Anglo-American Provision Co., 205 Ill. App. 411.

the question involved was as to whether or not the Workmen's Compensation Act of 1911 applied to the parties, *held* that a certified copy of a notice dated after the date of the accident that the defendant elected to come under the act as of the date of the notice, with a statement that before that time it had not come under the provisions of the act, was competent as an admission that the defendant was not under the act at the time the notice was filed.

6. MASTER AND SERVANT, § 823*—*when instruction as to amount of proof is erroneous*. In an action by an employee for personal injury, where plaintiff charged as negligence a violation of the so-called Structural or Building Act, Hurd's Rev. St. ch. 48 (J. & A. ¶ 5368 *et seq.*) *held* that an instruction that plaintiff must prove failure to erect the scaffold in a safe manner beyond a reasonable doubt was properly refused.

7. MASTER AND SERVANT—*what degree of proof required in action by servant for injuries due to violation of Structural Act*. An action for personal injuries based upon a violation of the so-called Structural or Building Act, Hurd's Rev. St. ch. 48 (J. & A. ¶ 5368 *et seq.*), is not an action to enforce a penalty, but a civil action to recover compensation for injuries, and the plaintiff is required to prove his case by a preponderance of the evidence only, and not beyond a reasonable doubt.

8. MASTER AND SERVANT, § 778*—*when instruction is properly refused as not conforming to evidence*. In an action for personal injuries by an employee against his employer, where the plaintiff charged a violation of the Structural or Building Act, and an instruction, that if the plaintiff himself was guilty of violating the statute the jury should find the defendant not guilty, was refused, *held* that such refusal was proper, as it was shown without contradiction that plaintiff had nothing whatever to do with the erection or construction of the scaffold.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Sasek v. Triska et al., 205 Ill. App. 414.

Annie Sasek, Appellee, v. Joseph F. Triska, trading as Joseph F. Triska & Company, and John S. Jurik, Appellants.

Gen. No. 22,884. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. EDWARD M. MANGAN, Judge, presiding. Heard in this court at the October term, 1916. Reversed with finding of fact. Opinion filed April 30, 1917.

Statement of the Case.

Action by Annie Sasek, plaintiff, against Joseph F. Triska, trading as Joseph F. Triska & Company, and John S. Jurik, defendants, for damages for malicious prosecution of a criminal case for receiving stolen goods. From a judgment for plaintiff for five hundred dollars, defendants appeal.

JENNINGS & FIFER, for appellants.

LEWIS F. JACOBSON and **DANIEL L. MADDEN**, for appellee; **R. C. MERRICK**, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. **RECEIVING STOLEN GOODS**—*what can be subject of complaint for.* Trees are bought and sold for planting as any other property is bought and sold, and can properly be made the subject-matter of a complaint charging a defendant with receiving stolen property.

2. **MALICIOUS PROSECUTION, § 74***—*when evidence is sufficient to show probable cause and want of malice.* In an action by a woman for damages for malicious prosecution of a criminal case for receiving stolen trees, where it appeared that trees similar to those owned by defendants were found on plaintiff's place and positively

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Rogers & Hall Co. v. Walden, 205 Ill. App. 415.

identified by the nurseryman who sold them to defendants; that plaintiff's son claimed to have bought them from a strange man going by in a wagon for about one-seventh of their actual value; that defendants were informed by police officers that plaintiff and her son, whom they had never before seen or heard of had bad reputations, and, acting on their advice, preferred charges against plaintiff, evidence held sufficient to show probable cause and want of malice.

3. MALICIOUS PROSECUTION, § 74*—*what must be proved in action for.* In an action for malicious prosecution, it is essential that malice be shown on the part of the defendant who started the prosecution, and a want of probable cause for believing that the plaintiff was guilty of the offense charged, and want of such probable cause is not shown by the acquittal of the plaintiff.

**Rogers & Hall Company, Appellee, v. James H. Walden,
Appellant.**

Gen. No. 22,887. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOHN COURTNEY, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 30, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Rogers & Hall Company, a corporation, plaintiff, against James H. Walden, defendant, to recover rent under a lease. From a judgment for plaintiff for \$1,497.02, defendant appeals.

CHYTRAUS, HEALY & FROST and JOHN PETER BARNES, for appellant.

WILLIAM J. PRINGLE and EDWIN TERWILLIGER, JR., for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Rogers & Hall Co. v. Walden, 205 Ill. App. 415.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 6*—*what constitutes a lease*. In an action to recover upon a document claimed to be a lease, whereby the defendant agreed to rent certain premises for a stated term and rental and to execute within a reasonable time "the customary form of lease," and the conduct of the parties indicated an intention that the document should be considered as a lease, and the agreement to subsequently execute "the customary form of lease" was waived by mutual consent, and the defendant sublet half of his space to a third party under a written agreement wherein the document in question was referred to as a lease, and both the defendant and his subtenant entered into possession and paid rent for several years, *held* that such agreement constituted a lease.

2. LANDLORD AND TENANT, § 449*—*what is insufficient to constitute surrender of tenancy*. Where, in an action for rent upon a lease, the defendant claimed that it had been dispossessed, and it appeared that after the defendant had vacated, the subtenant remained in possession of part of the premises, *held* that as the possession of the subtenant was in legal contemplation the possession of the defendant, the latter could not make a surrender of the tenancy without yielding up the premises in their entirety.

3. LANDLORD AND TENANT, § 451*—*when reletting of abandoned premises does not constitute termination of lease*. Where, in an action for rent upon a lease, the defendant claimed that the giving of a lease of part of the premises to the defendant's subtenant, after the vacation by the defendant of the part occupied by it, terminated the defendant's liability, and it appeared that such subtenant gave a note to plaintiff for the rent due from it to the defendant as its subtenant, with the understanding that plaintiff would agree to protect the subtenant against the claims of the defendant, and part of the note was paid and applied on the defendant's account, *held* that plaintiff had the right to apply whatever might be collected from the defendant's subtenant on account of the subsequently accruing rental, and that even if the transaction between the plaintiff and such subtenant was a reletting, it did not constitute a surrender by the plaintiff of his lease.

4. LANDLORD AND TENANT, § 301*—*when taking possession of abandoned premises does not relieve tenant from liability for rent*. A landlord may re-enter and again rent the premises abandoned without fault on his part, and credit the lessee with the proceeds, and his so taking possession does not relieve the tenant from the payment of rent.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Clifford Hodges, by Alfred Hodges, Appellee, v.
Charles A. Coey, trading as Charles A. Coey School
of Motoring, Appellant.

Gen. No. 22,891. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. SAMUEL H. TRUDE, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 30, 1917.

Statement of the Case.

Action by Clifford Hodges, a minor, by Alfred Hodges, his next friend, plaintiff, against Charles A. Coey, trading as Charles A. Coey School of Motoring, defendant, to recover damages for personal injuries due to a collision between defendant's automobile and plaintiff's bicycle. From a judgment for plaintiff for five hundred dollars, defendant appeals.

BENJAMIN LEVERING, for appellant.

ELLIS & WESTBROOKS, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. AUTOMOBILES AND GARAGES, § 3*—*when evidence is sufficient to show that driver of automobile was guilty of negligence and bicycle rider not guilty of contributory negligence.* In an action to recover for personal injuries sustained by a minor as the result of being struck by the defendant's automobile, where such minor was riding a bicycle at a street intersection about three feet from the curb, and the automobile as it came into the cross street cut diagonally across at the rate of about fifteen miles an hour and struck plaintiff at a point about three feet from the corner and carried him about five feet around the corner, *held* that the finding of the jury that the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.
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plaintiff exercised ordinary care and that defendant was negligent was fully justified from the evidence.

2. MUNICIPAL COURT OF CHICAGO, § 13*—*what are essentials of pleading in action of fourth class in tort.* In an action of the fourth class in the Municipal Court for personal injuries, the plaintiff is only required to file a brief statement giving the nature of the tort, and such further information as will reasonably inform the defendant of the nature of the case.

**John Liss, Appellee, v. Haskell & Barker Car Company,
Appellant.**

Gen. No. 22,907. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 30, 1917. Rehearing denied May 14, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by John Liss, plaintiff, against the Haskell & Barker Car Company, defendant, to recover damages for personal injuries sustained while working in defendant's car factory. From a judgment for plaintiff for \$20,000, defendant appeals.

J. B. COLLINS and ROSE & SYMMES, for appellant; C. R. COLLINS, of counsel.

DAVID K. TONE and FRANK A. ROCKHOLD, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Abstract of the Decision.

1. MASTER AND SERVANT, § 95*—*when foreign law governs as to liability for injuries to servant.* In an action to recover for personal injuries sustained by an employee while at work in Indiana, where negligence was predicated upon the Indiana Employers' Liability Act, *held* that the provisions of the Indiana statutes were binding in the Illinois forum, even though contrary to the local practice.

2. MASTER AND SERVANT, § 699*—*when evidence is sufficient to show negligence of fellow-servant and due care of car carpenter.* In an action by a car carpenter under the Indiana Employers' Liability Act to recover for personal injuries sustained while working in a shop, due to the backing of a locomotive against separated cars on the same track, and knocking them against the car he was working on, and the next car while he was passing between the latter two, where it appeared that plaintiff had looked in both directions before going between the cars and had seen no engine and defendant's fellow-servants had failed to send ahead a brakeman to see if any one was working on the cars, pursuant to custom, evidence *held* sufficient to show negligence of a fellow-servant and due care of plaintiff.

3. APPEAL AND ERROR, § 806*—*when finding of jury in personal injury case not disturbed because of defective bill of exceptions.* Where a bill of exceptions in a personal injury case, in which the plaintiff was injured by being caught between cars located on a track in the shop of the defendant where there were many other cars and tracks, failed to contain one or more blue prints and a photograph which were introduced as exhibits and shown to the jury, which apparently indicated the position of the tracks and surroundings and were of value in fixing in the minds of the jury the physical situation and surroundings, *held* that in the absence of such exhibits the reviewing court could not presume to find the weight of the evidence contrary to the finding of the jury.

4. APPEAL AND ERROR, § 806*—*when question of excessiveness of damages not reviewed.* In an action for personal injuries, where the bill of exceptions did not contain several X-ray plates and photographs which were identified and testified about by doctors on both sides, *held* that the question as to whether the damages were excessive could not be considered.

5. DAMAGES, § 120*—*when verdict for personal injuries is not excessive.* In a personal injury case where it appeared that plaintiff sustained a fracture of the pubic arch, with a rupture of the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Sindak v. Jaskowiak, 205 Ill. App. 420.

bladder, and a disintegration of the pubic bone seemed to have followed also with abdominal hernia; that inflammation of the separated ligaments formerly attached to part of the bone, which was missing, set in, so as to render it difficult for plaintiff to use one of his legs in walking; that the pelvic arch became weakened, and there was also severe bladder disease causing infection and inflammation, *held* that a judgment for \$20,000 was not excessive.

Peter Sindak, Appellee, v. Stanley Jaskowiak, Appellant.

Gen. No. 22,922. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HARRY P. DOLAN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 30, 1917.

Statement of the Case.

Action by Peter Sindak, plaintiff, against Stanley Jaskowiak, defendant, to recover damages for injuries sustained by being bitten by defendant's dog. From a judgment for plaintiff for \$600, defendant appeals.

J. S. DUDLEY, for appellant.

VINCENT G. GALLAGHER and ERNEST MESSNER, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. *ANIMALS, § 46**—when verdict for damages for injuries from bite of dog is not excessive. A verdict for \$900, reduced by re-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Zeno v. Ballard, 205 Ill. App. 421.

mittitur to \$600, *held* not excessive where a man was bitten in the leg by the defendant's dog, and where the leg bled profusely and the laceration of the muscles caused a permanent condition, and plaintiff was under the care of a physician for nearly three months and suffered an actual loss of twenty weeks' time at \$18 a week.

2. ANIMALS, § 43*—*when evidence is sufficient to sustain judgment for injuries to person by dog.* In an action to recover for personal injuries sustained by plaintiff as the result of being bitten by a dog of the defendant, where it appeared that the plaintiff was visiting at a house located in the rear of the lot on which the defendant's saloon was located; that as he was leaving the premises, the dog, which was being led by a chain, jumped up and bit plaintiff, and that the vicious character of the dog was known to the defendant, *held* that the judgment in favor of the plaintiff would not be disturbed.

**William A. Zeno, Appellee, v. Dr. James H. Ballard,
Appellant.**

Gen. No. 22,937. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. SAMUEL C. SROUGH, Judge, presiding. Heard in this court at the October term, 1916. Reversed and judgment here. Opinion filed April 30, 1917.

Statement of the Case.

Action by William A. Zeno, plaintiff, against Dr. James H. Ballard, defendant, to recover damages for malicious prosecution of a criminal case against plaintiff. From a judgment for seventy dollars in favor of plaintiff, defendant appeals.

WILLIAM S. STAHL, for appellant.

No appearance for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Zeno v. Ballard, 205 Ill. App. 421.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. MALICIOUS PROSECUTION, § 13^d—*when person acting on advice of prosecuting attorney is not liable for arrest of plaintiff on criminal charge.* In an action for malicious prosecution for causing plaintiff's arrest, where it appeared that plaintiff, by forging defendant's name to a receipt for certain articles, secured such articles; that plaintiff possessed a bad reputation, and had previously served in the bridewell on a sentence for forgery; that before taking out the warrant the defendant went to the State's Attorney's office and accurately stated the facts to two assistant State's Attorneys and was by them advised to get out a warrant for forgery, and was directed to another assistant State's Attorney at a branch of the Municipal Court, and, upon stating the facts to him, was advised to get out the warrant and thereupon he caused the arrest of plaintiff, *held* that under such circumstances the defendant could not be held answerable.

2. MALICIOUS PROSECUTION, § 13^e—*when person consulting attorney not liable for institution of criminal proceedings.* Where a person before commencing criminal proceedings consults an attorney in good standing and gives him all the facts, and then acts upon the attorney's advice, he will not be liable in an action for malicious prosecution.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

John C. Cannon, Administrator, Appellee, v. Chicago Railways Company, Appellant.

Gen. No. 22,960. (Not to be reported in full.)

- Appeal from the Superior Court of Cook county; the Hon. M. L. McKINLEY, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 30, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by John C. Cannon, administrator of the estate of Cornelius J. Lynch, deceased, plaintiff, against Chicago Railways Company, defendant, to recover damages for the alleged wrongful death of said Cornelius J. Lynch, due to his being struck by a passing street car on a parallel track after having alighted from another car. From a judgment for plaintiff for \$10,000, defendant appeals.

FRANK L. KRIETE, for appellant; W. W. GURLEY, J. R. GUILLIAMS and JOSEPH D. RYAN, of counsel.

QUIN O'BRIEN, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. CARRIERS, § 476*—*when evidence is sufficient to sustain finding that passenger struck by another car after alighting is not guilty of contributory negligence.* In an action against a street car company to recover for death of a passenger who, after alighting in the daytime from a westbound car, went around the back end of the car and then southward, with the apparent intention of crossing the street and transferring to a car on a north and south street, and was struck by an eastbound car going at the rate of about

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Cannon v. Chicago Railways Co., 205 Ill. App. 423.

twenty-five miles an hour, without any warning, and where it appeared that the deceased walked slowly and, as he came around the car, looked west and that just then the car was up to him, and that another man was walking towards deceased from the opposite direction and was near the south rail of the eastbound track and only about eight to twelve feet from the deceased, and that there was nothing between this man and the eastbound track to obstruct his view of the approaching car, and that this man testified that all of a sudden he heard the rumble of a car, and as he turned around it was right up to him and he jumped off the track, and that just then the deceased was struck by such car, *held* that the conclusion of the jury that such deceased was exercising ordinary care would not be disturbed.

2. CARRIERS, § 479*—*when giving of instruction directing attention to testimony of defendant's employees is harmless error.* In an action for death of a street car passenger caused by the decedent being struck by another street car after alighting from the car in which he was riding, where an instruction was given which particularly tended to direct the attention of the jury to the evidence of employees of the defendant, with the implication that they were interested in the result of the case, but it appeared that the testimony of such employees was not the subject of controversy and vital, *held* that the instruction was improper, but that as there was no serious controversy over matters testified to by the employees of the defendant, and as by another instruction the jurors were told that they could not discriminate against the testimony of the defendant's employees, and as the evidence tended to show that other witnesses might have been interested, the giving of the instruction did not constitute reversible error.

3. CARRIERS—*when operation of street car is negligent.* The operation of a street car in such a manner as to pass, at a speed of about twenty-five miles an hour without warning, at a busy transfer corner, another car on a parallel track which was stopped to permit passengers to alight, some of whom might cross the track on which such car was approaching, *held* to constitute negligence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Warren Land Company, Appellee, v. Chicago, St. Paul,
Minneapolis & Omaha Railway Company, Appellant.**

Gen. No. 22,764. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. J. J. COOKE, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 30, 1917.

Statement of the Case.

Action by Warren Land Company, a corporation, plaintiff, against Chicago, St. Paul, Minneapolis & Omaha Railway Company, defendant, to recover damages for delay in the shipment of four carloads of hay. From a judgment for plaintiff for \$297, defendant appeals.

For the decision on a prior appeal, see 195 Ill. App. 157.

IRVING HERRIOTT and IRA C. BELDEN, for appellant;
WILLIAM G. WHEELER, of counsel.

LEWIS S. EATON, for appellee.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

1. CARRIERS, § 105*—*when evidence is sufficient to sustain verdict for plaintiff in action for negligent delay in delivery.* In an action against a railroad company to recover damages caused by delay in the delivery of certain carloads of hay, held that the evidence was sufficient to sustain the verdict for plaintiff.

2. APPEAL AND ERROR, § 1725*—*what is effect of decision on former appeal.* On a second appeal the Appellate Court is precluded from considering questions which were determined on the former appeal.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Wimmer v. Chicago Railways Co., 205 Ill. App. 426.

Gertrude Wimmer, Appellee, v. Chicago Railways Company, Appellant.

Gen. No. 22,767. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. DAVID F. MATCHETT, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 30, 1917. Rehearing denied May 10, 1917.

Statement of the Case.

Action by Gertrude Wimmer, plaintiff, against the Chicago Railways Company, defendant, to recover damages for personal injuries sustained while alighting from one of defendant's street cars. From a judgment for plaintiff for \$6,400, defendant appeals.

For the decision on a former appeal, see 185 Ill. App. 523.

JOSEPH D. RYAN and WATSON J. FERRY, for appellant; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

ALBERT H. MEADS and LESLIE J. AYER, for appellee.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

1. CARRIERS, § 476*—*when finding of jury as to occurrence of accident to alighting passenger is sustained by evidence.* In an action by a woman passenger against a street car company to recover for personal injuries, where the plaintiff, as the sole witness in her own behalf as to the accident, testified that she was thrown from the car through its jolting while she was on the rear platform preparatory to alighting, and the conductor testified that the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

car did not give a jolt and that notwithstanding the car was going at the rate of twelve to fifteen miles an hour, and the signal had been given for the car to stop at the crossing west of where the accident occurred, plaintiff deliberately walked off the car in about the middle of the block, and the testimony of the only other witness to the actual occurrence contradicted plaintiff as to the jolting of the car, but was not reliable, *held* that the version of the plaintiff was the more reasonable and that the finding of the jury, who had an opportunity to see and hear the witnesses, would not be disturbed.

2. DAMAGES, § 110*—*when verdict for permanent injuries is not excessive.* A verdict for \$6,400 in favor of a woman who was thrown from a street car, *held* not excessive, where it appeared that plaintiff sustained a fracture of the arm, and immediate efforts to set it resulted in failure; that thereafter plaintiff was admitted to a hospital where she was operated on and remained eleven days; that the arm was then in a cast for five weeks and thereafter was carried in a sling; that after nine months plaintiff, on attempting to resume her work of stenography and bookkeeping, was unable to do so because of soreness in the arm; that she was unable to do any work for the succeeding seventeen months, with the exception of two weeks, and, at the time of the trial, six years after the accident, she was unable to lift her arm above her shoulder, and the movement of the arm was restricted and the injured arm was shorter and otherwise smaller than the other arm, and there was permanent atrophy of the muscle.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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**Svenska National Förbundet i Chicago (Complainant),
Appellee, v. Swedish National Association and
Othella Myhrman (Defendants).**

**Swedish National Association (Cross Complainant), v.
Svenska National Förbundet i Chicago (Cross De-
fendant).**

On Appeal of Swedish National Association, Appellant.

Gen. No. 22,769.

1. CORPORATIONS, § 61*—*what is right of corporation to acquire different name by usage or prescription.* Where a corporation has been given a corporate name by its charter, it cannot at the same time acquire, either by usage or prescription, a legal right to a different corporate name.

2. CORPORATIONS, § 50*—*when evidence is sufficient to show that charitable corporation has ceased to exist.* On a bill by a corporation having the name of "Svenska National Förbundet i Chicago," to restrain the use by the defendants, Swedish National Association and an individual, of the names "Svenska National Förbundet," or "Svenska National Förbundet, Chicago, Illinois," or "Svenska National Förbundet i Chicago," which were the Swedish equivalent for the name of the complainant, where the question was which of the complainant and defendant corporations had the right to use the said name in the Swedish language, and where it appeared that the individual defendant for some years preceding the filing of the bill had conducted a private business under the name of the defendant corporation; that for several years there was an utter failure upon the part of the defendant corporation to comply with the statutes relating to the organization of corporations not for profit, and no effort was made to comply with the beneficent purposes of such corporation, and the evidence disclosed a purpose to use such corporation or its name in money-making ventures directly opposed to the charitable purposes for which it was organized, held that the evidence was sufficient to sustain the finding that the defendant corporation had ceased to exist some years before the filing of the bill.

3. TRADE-MARKS AND TRADE NAMES—*when corporation may not use equivalent in foreign language of trade name.* On a bill to restrain the use by the defendants of the name of the complainant, a corporation not for pecuniary profit, where the question was,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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which of the parties, the complainant, Svenska National Förbundet i Chicago, or the defendant, Swedish National Association, had the legal right to use the name "Svenska National Förbundet i Chicago" or "Svenska National Förbundet," or "Svenska National Förbundet, Chicago, Illinois," and it appeared that the words "Swedish National Association" were the equivalent of the Swedish words "Svenska National Förbundet," and that the names which constituted the real basis of the controversy had almost the same meaning, held that the defendant had no right to use any but its corporate name, and therefore had no right to use the Swedish equivalent for its corporate name.

4. CORPORATIONS, § 61*—*when corporation cannot acquire title to other than corporate name.* If a corporation uses a name other than its corporate name, it can acquire no legal title to the latter, however extensive such use may have been.

5. EQUITY—*when cross-bill is properly dismissed.* Where upon the issues raised by the original pleadings it is determined that the complainant is entitled to the relief prayed against the defendant, and the determination of that question necessarily involves a consideration of every relief sought by the defendant in his cross-bill, the sustaining of a demurrer to and consequent dismissal of the cross-bill is proper.

Appeal from the Circuit Court of Cook county; the Hon. FREDERICK A. SMITH, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 30, 1917. *Certiorari* denied by Supreme Court (making opinion final).

CHYTRAUS, HEALY & FROST, CHARLES P. LINDER and JOHN PETER BARNES, for appellant.

JOSEPH G. SHELDON, for appellee.

MR. JUSTICE DEVER delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of Cook county in favor of the complainant, Svenska National Förbundet i Chicago, and against the defendants, Swedish National Association and Othelia Myhrman, and from an order of the Circuit Court sustaining a demurrer to the cross-bill filed in the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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cause by the defendant Swedish National Association. The appeal is prosecuted by the association alone.

The bill of complaint was filed May 14, 1914, by the complainant against both defendants, in which bill it was charged that on October 10, 1913, the complainant was organized as a corporation, not for pecuniary profit; that ever since the date of its, complainant's, organization the defendant Swedish National Association had used the name Svenska National Förbundet i Chicago, and that said defendant had endeavored by the use of such name to create the belief among the people of Chicago that the complainant association had unfairly and with a view to misleading the public used the name Svenska National Förbundet. The cross-bill of the defendant association was filed January 29, 1916. The defendants answered the bill of complaint, and the cause was referred to a master in chancery to hear evidence and to report thereon his conclusions of law and fact.

On January 31, 1916, the master filed his report. A large volume of testimony and documentary evidence was introduced in the hearing before the master; exceptions thereto were filed and argued; the report of the master together with the exceptions and objections were subsequently filed in court. On April 22, 1916, the court entered a decree ordering that the defendants be perpetually enjoined from using the name Svenska National Förbundet or Svenska National Förbundet i Chicago, in advertising or in any manner whatsoever. The court further ordered that the general demurrer of the complainant to the cross-bill of the defendant association be sustained, and the association electing to stand by its cross-bill, the court decreed that the cross-bill be dismissed for want of equity.

While the record here is very long and the questions of law and fact have been elaborately argued by coun-

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sel, the case really presents for determination but one principal question, and that is, which of the parties, the complainant, Svenska National Förbundet i Chicago, or the defendant, Swedish National Association, has the legal right to use the name "Svenska National Förbundet i Chicago," or "Svenska National Förbundet," or "Svenska National Förbundet, Chicago, Illinois."

The complainant corporation was organized in October, 1913, under the name Svenska National Förbundet i Chicago. The defendant corporation was organized May 25, 1894, under the name Swedish National Association. The charter of this defendant was amended on December 31, 1896, but the articles of incorporation and the certificate of change of purpose and object of the defendant corporation above referred to were not filed, in accordance with the statutes of the State of Illinois, in the office of the Recorder of Deeds of Cook County until January 6, 1914. Originally the defendant association was organized for the purpose of promoting the temperance, morality and temporal welfare of the Swedish people of Chicago. This corporation, as we gather from the evidence in the record, was made up of delegates or representatives of many Swedish organizations existing in the City of Chicago.

It is charged in the bill of complaint that the words "Swedish National Association" are the equivalent of the Swedish words "Svenska National Förbundet." There is some intimation in the record that the Swedish word "förbundet" is the equivalent of the English word "association" or "federation," but it seems to be conceded that the names which constitute the real basis of the controversy have almost the same meaning. It is alleged in the answer filed by the defendant association, as also in its cross-bill, that for many years following its organization it had pro-

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moted picnics, festivals, fairs and other entertainments which were patronized almost exclusively by persons of Swedish birth or parentage; that the Swedish equivalent of the word "Swedish" is "Svenska"; that the Swedish equivalent of the word "National" is "National," and that the Swedish equivalent of the word "Association" is "Förbundet"; that the Swedish people of Chicago, in using the name of the defendant association, had usually given it the Swedish form of "Svenska National Förbundet"; that the name "Svenska National Förbundet" has at all times since the date of the organization of defendant corporation been used by it, its members and its patrons, and that it was generally known by the Swedish people throughout Chicago by such name.

The evidence heard by the master tends to disclose that about ten years after the organization of the defendant association, the defendant Othelia Myhrman became active in its affairs; that in the year 1904 the defendant association introduced the sale of intoxicating liquors at certain of its festivals, and that thereafter, about the year 1912, the defendant association, which had formerly conducted a free library and a free labor bureau, began the business of selling books and of operating its labor bureau for profit. The charter of this corporation as amended gives the purposes of the association as follows:

"1. To promote temperance, morality and temporal welfare among the Swedish-American people of Cook County;

"2. To maintain a free labor bureau and library;

"3. To be of mutual aid and assistance in enforcing the legal rights of such persons as its members may designate."

It is shown by the evidence that following the year 1904, at the time the sale of liquors referred to began, such controversy arose among the members of the defendant association concerning this practice, and

also that during the years 1909, 1910, 1911 and 1912, many, if not quite all, of the members of the organization withdrew therefrom; the complainant, as stated, was organized in the year 1913. There is some conflict in the evidence with reference to this history of the defendant association, but we think there can be small doubt that the defendant Othelia Myhrman became the controlling spirit of the defendant, and that during the years just preceding the filing of the bill of complaint she, in fact, conducted a private business under the name of the defendant association. The record fails to disclose that any meetings were held by the defendant during several years prior to the filing of the bill; no officers were elected, and not much effort was made to comply with the beneficent purposes of the organization; there was an utter failure upon its part to comply with the statutes relating to the organization of corporations not for profit; and from the whole record we are of the opinion that whatever may be said about the actual use of the name or names in question, the defendant association had no legal or actual existence for several years prior to the filing of the bill. There is evidence in the record from which we think the master was justified in finding, as he did, that the defendant Othelia Myhrman for some years prior to the filing of the bill had used the name of the defendant association as her individual property. The evidence does disclose a purpose to use the corporation, or its name, in money-making ventures directly opposed to the charitable and praiseworthy purposes for which it was organized.

The evidence touching these controverted questions is voluminous; it would serve no useful purpose to indicate all of this evidence; it is sufficient to say that we are convinced from our examination of it that the master who heard the evidence, and the chancellor who confirmed his report, had ample reason for the

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finding that the defendant corporation had ceased to exist some years before the bill was filed.

We do not think that there is great merit in the contention that because it was shown that the name "Svenska National Förbundet" had been used by the defendant association, or by the defendant who used the corporate name in the transaction of her business, entitles either of the defendants to any relief in a court of equity. Even if it be assumed, as urged, that the corporation defendant had used complainant's corporate name in the transaction of its business, it had no legal right to use such name; the law had conferred upon it a legal name and title, by which alone it was authorized to transact business; it had no express or implied authority to use any other name, and if it in fact did use such other name it could acquire no legal right thereto, however extensive such use may have been. Paragraph 22^a of chapter 38, Revised Statutes of Illinois (J. & A. ¶ 3858), directly prohibits a corporation from transacting any business under any other or different name than that conferred upon it by its articles of incorporation. We are inclined to agree with the contention that if the defendant corporation had the power to use without authority of law a name different from its legal corporate name, it would have the right to use an indefinite number of such names. We think it clear that the exercise of any such practice is against the public policy of the State.

In *Sykes v. People*, 132 Ill. 32, the Supreme Court held that where a corporation has been given a corporate name by its charter, it cannot at the same time acquire, either by usage or prescription, a legal right to a different corporate name.

So far as this record shows, the name Svenska National Förbundet i Chicago was first legally acquired by the complainant. The words that go to make up

the names Svenska National Förbundet and Swedish National Association are in no sense similar except in meaning; they are clearly distinguishable; the words that go to form each name are, when translated, nearly synonymous, but in spelling, language and sound they are not at all alike. It should be borne in mind that we are dealing here with proper names, and that the very essence of a proper name is that it identifies the individual without necessarily indicating anything of its or his character.

Our attention has not been called to any case where it has been determined that a corporation has a right not only to the actual name given to it by its articles of incorporation but also to a translation of such name into a foreign language. We do not think, when consideration is given to the fact that corporate names, like all other proper names, serve only the purposes of identification, that there is much merit in the contention made that the defendant association has a legal and exclusive right to the Swedish translation of its corporate name.

It is also urged that the trial court erred in directing in the decree a dismissal of the defendant corporation's cross-bill. It was the duty of the defendant to have used due diligence in seeking the affirmative relief by its cross-bill which it asserts at this time it is entitled to. The bill of complaint was filed on May 11, 1914; the cross-bill was not filed until January 29, 1916. No reason is given for this long delay. As a matter of fact, no new issue is presented in the cross-bill. The material allegations of the cross-bill and the answer of the defendant corporation are substantially the same. As stated by counsel for cross complainant, the cross-bill was filed so that defendant might obtain affirmative relief on the evidence that had already been heard. The cross-bill was properly filed on the day in question, but as it pre-

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sents no new issues either of law or fact, and as it is not contended that a determination of the rights of the cross complainant under it would require a hearing of any further evidence, we are unable to see how the defendant association can complain of this action of the trial court. A general demurrer was filed by complainant to this cross-bill, and in the decree it appears that this demurrer was sustained. Whatever the form by which the questions raised by the filing of the cross-bill were presented to the trial court, it is clear upon the face of the record that the cross-bill, after the issues presented by the original bill of complaint and the answers had been determined, was in legal effect eliminated from the cause. It might have been more correct practice to have stricken the cross-bill from the files. Upon the issues raised by the original pleadings it was properly determined that the complainant was entitled to the relief prayed by it against the defendants, and the determination of this question necessarily involved a consideration of every relief sought by the defendant association in its cross-bill.

The decree of the Circuit Court will be affirmed.

Affirmed.

William R. Brand, trading as Brand Agency, Appellant, v. James P. Younger, Appellee.

Gen. No. 22,795. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. PETER C. WALTERS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 30, 1917. Rehearing denied May 14, 1917.

Statement of the Case.

Action by William R. Brand, trading as Brand Agency, plaintiff, against James P. Younger, defendant, to recover the sum of \$931.96, alleged to be due under a contract for the collection of accounts by plaintiff for defendant. From a judgment for defendant, plaintiff appeals.

WILLIAM R. BRAND, for appellant.

JOEL C. CARLSON, for appellee.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

1. **PRINCIPAL AND AGENT, § 21***—*when owner of accounts may assume that collection agency has abandoned contract.* In an action to recover the amount which plaintiff claimed accrued to him under a written contract for collection of accounts, providing that as compensation the entire proceeds of one of the claims and a proportionate part of the other claims collected should be retained by the plaintiff as compensation, where plaintiff collected only the one account of which he was to keep the entire proceeds, and kept the same and did nothing as to the other accounts for about ten years, and the particular account which was the basis of plaintiff's suit was collected by another attorney ten years after the contract

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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was entered into by plaintiff, and the contractual relations between the plaintiff and defendant were severed shortly after the contract was entered into, *held* that, as a result of plaintiff's conduct, the defendant was authorized to assume that plaintiff had abandoned his contract and any rights which he might originally have asserted thereunder.

2. PRINCIPAL AND AGENT, § 11*—*when contract with collection agency may be rescinded by principal.* In an action to recover the amount which plaintiff claimed accrued to him under a written contract under which the defendant turned over to the plaintiff various accounts for collection, and agreed that as compensation the entire proceeds of one of the claims and a proportionate part of the other claims collected should be retained by the plaintiff as compensation, where the plaintiff collected only the one account of which he was to keep the entire proceeds, and kept the same and did nothing as to the other accounts for about ten years, and the particular account which was the basis of plaintiff's suit was collected by another attorney ten years after the contract was entered into by plaintiff, *held* that the contract was not an assignment of the accounts, but merely a contract of employment, and that the defendant had the right to rescind such contract by reason of the failure of the plaintiff to use diligence in its performance.

Curtis Publishing Company, Appellant, v. City of Chicago, Appellee.

Gen. No. 22,858. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed April 30, 1917.

Statement of the Case.

Bill by the Curtis Publishing Company, a corporation, complainant, against the City of Chicago, defendant, to enjoin the city and its officers from interfering with the exhibition and sale of a certain

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

weekly publication upon sidewalk news stands. A temporary injunction was granted and, upon demurrer, was dissolved and the bill was dismissed for want of equity. An appeal to the Supreme Court was dismissed on the ground that the validity or constitutionality of the city ordinances in question was not involved, and the case was transferred to the Appellate Court.

For the decision on the appeal to the Supreme Court, see 273 Ill. 373.

DARROW & SISSMAN, for appellant.

S. A. ETTTELSON, for appellee.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 201*—*when Appellate Court has no jurisdiction as to validity of ordinance.* The Appellate Court has no jurisdiction to pass upon the partial validity of a city ordinance as well as the total validity thereof.

2. MUNICIPAL CORPORATIONS—*when ordinance regulating use of news stands not construed so as to include all newspapers.* A city ordinance providing that the commissioner of public works is authorized to permit stands to be maintained on the public streets during certain hours, which shall be used for the sale of daily newspapers printed and published in the city, should not be construed by striking out the limiting language and inserting in lieu thereof "all newspapers," as it was clearly not the intention of the city council in adopting the ordinance to use such language.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Waller v. Richter, 205 Ill. App. 440.

**Marie Waller, Defendant in Error, v. W. J. Richter,
Plaintiff in Error.**

Gen. No. 22,172. (Not to be reported in full.)

ERROR to the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed May 1, 1917.

Statement of the Case.

Action by Marie Waller, plaintiff, against W. J. Richter, defendant, to recover rent for premises rented by defendant as tenant from month to month. From a judgment for plaintiff, defendant brings error.

HENRY KNAUS, for plaintiff in error.

No appearance for defendant in error.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 479*—*what notice of termination of tenancy necessary by tenant from month to month.* A landlord is entitled to thirty days' notice from a tenant from month to month, when the latter desires to terminate his tenancy.

2. MUNICIPAL COURT OF CHICAGO, § 13*—*when affidavit of merits is properly stricken.* In an action in the Municipal Court for one month's rent due from the defendant as a tenant from month to month, where plaintiff claimed that the tenant vacated on August 30th without giving the necessary notice, and in the affidavit of merits it was stated that notice was given during such month that the defendant would vacate the premises at the expiration of said month, held that thirty days' notice was required on the part of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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such tenant to terminate his tenancy, and that the affidavit of merits was properly stricken.

3. MUNICIPAL COURT OF CHICAGO, § 13*—*when statement of claim in action for rent is sufficient.* Where, in an action in the Municipal Court for rent due from the defendant, it was alleged that the claim was for rent due and unpaid for September, 1915, for premises occupied by the defendant as a tenant from month to month, and that the tenant vacated the premises on August 30, 1915, without giving the plaintiff, the landlord, necessary notice to terminate such tenancy, *held* that such statement of claim was sufficient to state the general nature of the cause of action and to meet the requirements of the Municipal Court Act.

Michele Consiglio, Defendant in Error, v. Emilio Longhi, trading as Italian & Greek Product Company, Plaintiff in Error.

Gen. No. 22,193. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and remanded. Opinion filed May 1, 1917.

Statement of the Case.

Action by Michele Consiglio, plaintiff, against Emilio Longhi, trading as the Italian & Greek Product Company, defendant, to recover on a demand promissory note for four hundred dollars, of which defendant was maker. From a judgment for plaintiff, defendant brings error.

BROWN & NAVIGATO, for plaintiff in error.

MORGAN & McFARLAND, for defendant in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Consiglio v. Longhi, 205 Ill. App. 441.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. **BILLS AND NOTES, § 87***—*when note is payable on demand. A note which expresses no time for payment is payable on demand.*

2. **BILLS AND NOTES, § 420***—*what evidence is properly excluded in action on demand note.* In an action on a promissory note payable on demand, where the defense was that the note was given for a deposit made by the payee with the defendant, to secure the latter against loss on certain accounts of merchandise sold for defendant by the payee on credit, that such accounts were guaranteed by the payee and proved worthless, that the loss exceeded the amount of the note, that plaintiff did not become the owner of the note until long after maturity, and the offer of the defendant to prove that when the note was offered to him for payment fifteen months afterwards by the plaintiff it had not been indorsed by the payee, and that he then informed plaintiff that the payee was indebted to him in excess of the amount of the note, that he would not pay it and that the indorsements on the note were made subsequent to that time, *held* that in view of sections 53, 58, 59 of article IV of the Negotiable Instruments Act (J. & A. §§ 7692, 7697, 7698), such evidence was improperly excluded.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Catherine Cronin, Defendant in Error, v. Court of Honor, Plaintiff in Error.

Gen. No. 22,223. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY P. DOLAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed May 1, 1917.

Statement of the Case.

Action by Catherine Cronin, plaintiff, against the Court of Honor, defendant, on a fraternal insurance policy. From a judgment for plaintiff, defendant brings error.

FRANCIS J. SULLIVAN, for plaintiff in error; WILLIAM B. RISSE, of counsel.

P. F. MURRAY, for defendant in error.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 24*—*when assignments of error will not be reviewed.* On an appeal from the Municipal Court where the stenographic report had been stricken, and the court had thus nothing before it but the common-law record, *held* that none of the original assignments of error was open for consideration as they related to that part of the record so stricken.

2. MUNICIPAL COURT OF CHICAGO, § 24*—*when record will not be examined for omission in abstract.* On an appeal from the Municipal Court where the stenographic report had been stricken, and the original assignments of error were therefore not open for consideration, and where appellee was permitted to assign as an additional error that the statement of claim did not state a cause of action, but such statement of claim was not abstracted, *held* that the court would not go to the record to ascertain what such statement of claim contained.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

National Produce Bank of Chicago v. Dodds et al., 205 Ill. App. 444.

**National Produce Bank of Chicago, Plaintiff in Error,
v. R. J. Dodds and Mary Paddock Dodds, Defendants in Error.**

Gen. No. 22,266.

1. **BILLS AND NOTES, § 32***—*what does not constitute an acceptance of check.* Where a notice printed in a pass book provides that checks on the bank will be credited conditionally to a depositor and such is the custom in all the banks in the city in which the bank is located, the fact that a check on the bank is entered in a pass book and stamped as payable through a clearing house and is put through the usual bookkeeping methods of the bank for the tracing of the check until the status of the account on which it was drawn may be ascertained does not constitute an acceptance of such check within sections 131, 184, 186, 188 of the Negotiable Instruments Act (J. & A. §§ 7771, 7824, 7826, 7828).

2. **BANKS AND BANKING, § 100***—*what are rights of bank as to crediting deposit on debt of depositor.* A bank has the right, as against the holder of a check drawn by a depositor, to apply its credit balance to a debt due from such depositor to itself.

3. **BANKS AND BANKING, § 142***—*when bank is not obliged to accept checks against deposited check.* Where a check is deposited with a bank, the latter is not obliged to accept checks against it, until it can be determined in the regular course whether such check will be paid.

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed with judgment here and finding of fact. Opinion filed May 1, 1917.

Statement by the Court. Plaintiff in error brought a suit to recover the balance of \$165.99 with interest due on defendants' promissory note for \$300 dated October 27, 1914, and due three months thereafter. After the note fell due defendants claimed that they were entitled to have a check for \$166.10 that had been deposited to their account in plaintiff's bank on July 17, 1913, credited on the note, and the court,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

before which the case was tried without a jury, so found.

The check was drawn on plaintiff's bank by another of its depositors, the Tomlinson-Humes, Incorporated (herein referred to as the Humes Co.). At the opening of business on July 16th, the Humes Co. had on deposit to its credit \$567.75. During the day two other deposits to its account were made, one for \$270, the other a check for \$1,652.32 drawn on a party in Boston, Massachusetts, which was credited to said Humes Co.'s account and forwarded for collection, making a total book credit of \$2,490.07, and checks aggregating \$2,119.64 were charged to the account, leaving a book balance of \$370.43 at the close of day. During the day said company was reported to be on the verge of bankruptcy. If the Boston check was not good its account was thus overdrawn over \$1,000. The bank immediately stopped paying any credit balances on any funds against the uncollected Boston check. That day or the next morning a petition in bankruptcy was filed against said company, and it being indebted to the bank in excess of its balance of \$370.43, the account was closed out by applying the balance to the indebtedness of the bank on the morning of July 17th. No other sum was paid out of the Humes Co.'s account on July 17th. On that morning the check in question for \$166.10 was taken by defendants' clerk to the bank with the request that it be certified. The bank refused to certify it, the receiving teller saying that it would go through in the regular course of business. It was then left for deposit. On that day checks on the Humes Co. account that were found not good were charged back and returned to the depositors, and defendants were notified that the check in question was charged back to them because drawn against uncollected funds. Later in the day one of the defendants requested the

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cashier "to get him the money represented by the check, if possible," and left the check with the cashier, taking a receipt therefor stating that it was "received for collection July 17th." On the inside of the front cover of defendants' pass book used in making their deposits was the following printed notice which is printed in all pass books of all the Chicago banks, to wit:

"Checks on this bank will be credited conditionally. If not found good at close of business, they will be charged back to depositor's account and the latter notified of the fact. Checks on other city banks will be carried over for presentation on the following day.

"This bank, in receiving checks or drafts on deposit or for collection, acts only as your agent, and beyond carefulness in selecting agents at other points, and forwarding to them, assumes no responsibility."

It was shown to be the custom among all the Chicago banks, including plaintiff's, that when checks drawn on a bank by one of its depositors are presented to that bank by another depositor for deposit they are, in accordance with said notice, credited conditionally to the account of the depositor, and if not found good at the close of the day's business are charged back to his account. In plaintiff's bank all checks were stamped by the receiving teller when received and were then charged by the teller to the bookkeeper, who advises as to the condition of the accounts. The check in question was so stamped and treated. It was also shown to be the custom among Chicago banks to stamp the words "Payable through the Chicago Clearing House" on all checks that are certified and then have them signed and accepted by the authorized representatives of the bank delegated to attend to certifications.

FRED H. ATWOOD, CHARLES O. LOUCKS and VERNON R. LOUCKS, for plaintiff in error; HAROLD L. REEVE, of counsel.

EDWIN L. WAUGH, for defendants in error.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

The question is whether under the foregoing state of facts there was an acceptance or payment of the check in question by the bank.

Except as otherwise therein provided, the provisions of the Negotiable Instruments Act applicable to a bill of exchange payable on demand apply to a check (section 184, J. & A. ¶ 7824), and the acceptance of the bill must be in writing and signed by the drawee (section 131, J. & A. ¶ 7771). The act also provides that the certification of a check is made equivalent to an acceptance (section 186, J. & A. ¶ 7826), and that the bank is not liable to the holder of the check "unless and until it accepts or certifies the check" (section 188, J. & A. ¶ 7828). In view of these several provisions, we are of the opinion that neither the entry of the check in defendants' pass book, nor the stamping of it as paid, nor the subsequent bookkeeping methods for tracing the check until the status of the account on which it was drawn might at the close of day be determined, constituted an acceptance of the check within the meaning of the act. These several steps taken after the check was presented for deposit were the usual, if not necessary, methods employed by the bank before it could conveniently determine whether the check could be paid. They were in accordance with the custom of all the Chicago banks, and the depositors having printed notice thereof presumably contracted as such with reference thereto. The very fact that the bank thus gave notice of its method of doing business negatives the intention of an unqualified acceptance on its part. The Negotiable Instruments Act imposes no impediment to the adoption of such methods or to a conditional acceptance of checks. It would greatly impede the

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conduct of its business if a bank were obliged in effect to strike a ledger balance as checks are presented before it could safely take another for deposit. It would practically involve an immediate transfer on the bank's books from one account to another, an impracticable, if not an impossible, method of conducting business in large banks with numerous depositors.

While our attention is directed to the case of *American Exch. Nat. Bank v. Gregg*, 138 Ill. 596, as authority on the question as to what constitutes payment of a check, yet that decision was rendered before the enactment of the Negotiable Instruments Act of 1907, and, where inconsistent therewith, is, of course, not controlling. There are features here, too, that were not present in that case. No question arose there relative to a custom or to an implied agreement between the bank and its depositors for a conditional credit of checks given by one depositor to another. On the contrary, the decision recognized the bank's right to reject a check or receive it conditionally.

It was also there said that when the check involved was presented the question was whether the drawer had funds in the bank sufficient to pay it. When the check here in question was presented for deposit there were no funds to the credit of the Humes Co., the bank having already applied its credit balance to a debt due from Humes Co. to itself, which it unquestionably had a right to do. (*Morse on Banks and Banking*, 3rd Ed., secs. 324, 328; *Sachs v. Sachs*, 181 Ill. App. 342.) At that time the Boston check had been credited to such account only conditionally, and it could not then be determined whether it would be paid. Until that could be determined in the regular course, the bank was not obliged to accept checks against it. Hence, when the check in question was presented for deposit, not only did the bank refuse to certify it, thereby indicating its intention not to

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accept it otherwise than conditionally, according to notice contained in the pass book and the custom of the Chicago banks, but there were no funds to the Humes Co.'s credit out of which it could be paid. With knowledge of such conditions it would be strange indeed if the bank should be held to have accepted and paid the check it expressly refused to certify simply because it employed the convenient methods of mere bookkeeping as above referred to. Even defendants in error recognized the bank's right to hold the check until the close of day, for, when notified that the check was not good, they left it with the bank for collection and do not seem to have assumed a different attitude until the time came for the payment of their note subsequently given for borrowed money. As was stated in a very similar case, *Ocean Park Bank v. Rogers*, 6 Cal. App. 678, 92 Pac. 879: "The fact that the amount of the check * * * was entered upon a deposit slip, that the check was stamped 'Paid' and impaled upon a check file, are mere memoranda adopted in aid of the convenient dispatch of business." It was there said that such methods did not raise the presumption that the check was received as cash or otherwise than for collection, and that "the bank has until the close of banking hours on the day of deposit to ascertain whether the account of the drawer will permit of a transfer of the amount of the check to the depositor's account." We concur in that expression of the law, especially as it seems to comport with the provisions of our present Negotiable Instruments Act. Accordingly we think the bank was not liable for the amount of the check and that the judgment of the court should have been for the amount sued for, \$165.99, with interest at seven per cent. from January 27, 1915, and a judgment therefor amounting to \$190.12 will be entered here.

Reversed with judgment here and finding of fact.

Northern Trust Co. v. Parker, 205 Ill. App. 450.

Finding of fact. We find that the plaintiff in error, the National Produce Bank of Chicago, did not accept or pay the check drawn on it by the Tomlinson-Humes, Incorporated, to the order of Paddock & Dodds for \$166.10.

**Northern Trust Company, Administrator, Appellee, v.
Lewis W. Parker, Appellant.**

Gen. No. 22,366. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. FREDERICK A. SMITH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and remanded. Opinion filed May 1, 1917.

Statement of the Case.

Bill by Northern Trust Company, as administrator to collect of the estate of William Henry McDoel, complainant, against Lewis W. Parker, defendant, and cross-bill by Margaret Garvin and Jennie Kelly. From a judgment for complainant, defendant appeals.

GEORGE C. KING, for appellant.

HENRY M. HAGAN, for appellee McDoel's Estate.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. MORTGAGES, § 503*—*when evidence is insufficient to show want of consideration for notes.* In a suit to foreclose a trust deed, which was continued by the administrator of the deceased holder of the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

notes after the latter's death, *held* on the conflicting evidence of defendant and deceased, who was an aged man, that defendant had not established the defense of want of consideration and that the stock for which the notes were given had been promised by deceased to defendant in consideration of his subscribing for other stock of a corporation.

2. EVIDENCE, § 475*—*what does not constitute a preponderance of evidence.* A party holding the affirmative of a proposition is required to maintain it by a preponderance of the evidence, which can never be the case when one of two parties, both equally credible, makes an assertion which is denied by the other.

3. COSTS, § 20*—*when taxation against defendant is improper on cross-bill by other parties.* Where, on a bill to foreclose a trust deed, it appeared that four of the notes secured had been paid, that the deed provided that upon payment of any one of the notes the trustee might release a lot, that accordingly four lots were released, two of which the defendant sold, and such release was pleaded in the answer, and a cross-bill was filed by the owners of such lots, upon which an issue was formed and decided against the complainant, and that defendant in the original bill was taxed with the entire master's fee, which included the testimony on the issues formed on the cross-bill, *held* that the taxation of the costs on the cross-bill was improper.

4. COSTS, § 20*—*when defendant not liable for on cross-bill.* Where a trust deed provides for solicitor's fees incurred in any suit or proceeding in connection with the foreclosure to which the holder of the notes might be a party, the unsuccessful defendant is not liable for solicitor's fees for defending a cross-bill by other persons to which defendant is not a party.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Cronin et al. v. Tatge, 205 Ill. App. 452.

Emily J. Cronin and John F. Kelly, Appellees, v. Gustavus J. Tatge, Appellant.

Gen. No. 22,409. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed May 1, 1917.

Statement of the Case.

Bill by Emily J. Cronin and John F. Kelly, complainants, against Gustavus J. Tatge, defendant, for enforcement of a mechanic's lien. From a decree for complainants, defendant appeals.

ROBERT F. KOLB and PAUL W. TATGE, for appellant.

JAMES J. KELLY, for appellee.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

MECHANICS' LIENS, § 18*—*when lien lies for work in street.* Under section 1 of the Mechanics' Liens Act of 1903 (J. & A. ¶ 7139), providing that "any person who shall by any contract * * * with the owner of a lot * * * furnish material * * * for the purpose of, or in the building, altering, * * * any house or * * * sidewalk, whether such walk or sidewalk be on the land or bordering thereon, * * * or improvement, or appurtenance thereto on such lot * * * or connected therewith, and upon, over or under a sidewalk, street or alley adjoining; * * * shall have a lien," etc., a lien is given for work done in the performance of a contract for paving a street adjoining a lot, or building a sidewalk bordering thereon, or laying gas mains or sewers connected with the use of the lot or a building thereon, as the conjunction "and" beginning the clause "and upon or under a sidewalk" should be construed as "or" and the clause as modifying the words "improvement or appurtenance."

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Emma Van Zandt, Appellee, v. Metropolitan West Side
Elevated Railway Company, Appellant.****Gen. No. 22,429. (Not to be reported in full.)**

Appeal from the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and remanded. Opinion filed May 1, 1917.

Statement of the Case.

Action by Emma Van Zandt, plaintiff, against the Metropolitan West Side Elevated Railway Company, defendant, to recover for injuries alleged to be due to a part of the metal fixture to one of the ventilators in a car falling on plaintiff while riding as a passenger in such car. From a judgment for plaintiff, defendant appeals.

ADDISON L. GARDNER and ERWIN W. ROEMER, for appellant.

EARL J. WALKER, for appellee.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. CARRIERS, § 459*—*when burden of proving negligence in making inspection of equipment of car is upon plaintiff.* In an action by a passenger to recover for injuries received by a falling object in the car, which she charged was the result of failure to use ordinary care in inspecting the equipment and appliances of the car, held that the burden of proving such claim rested with the plaintiff.

2. CARRIERS, § 476*—*when evidence is insufficient to sustain verdict for plaintiff for injury alleged to be due to falling object.* In

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Bass Foundry & Mach. Co. v. Sulzberger & Sons Co., 205 Ill. App. 454.

an action by a passenger against a carrier for injuries sustained as the result of being struck by a falling object while plaintiff sat in a car, where plaintiff's theory was that the object was part of the metal fixture or arm to one of the ventilators inside and near the top of the side of the car, and the defendant's theory was that it came from outside the car, and the object was never found, plaintiff's witness claiming that one of the arms that stuck out of the ventilator was gone and that she saw it on the seat right after it fell, and the conductor claiming that he failed to find the object in his search made immediately afterwards, and but one witness testified on each side to seeing the object, while defendant's witness stated that it passed swiftly by his face from an open window and towards plaintiff, and plaintiff's witness testified that she saw the object pass the man's head and that it came from a distance, and plaintiff's witness had testified at a former trial that she could not tell just what it was that struck plaintiff and did not know where it came from, *held* that the verdict in favor of plaintiff was not only manifestly against the weight of the evidence, but that the preponderance was in favor of the defendant.

Bass Foundry & Machine Company, Appellee, v. Sulzberger & Sons Company, Appellant.

Gen. No. 22,315. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and remanded. Opinion filed May 1, 1917. Rehearing denied May 10, 1917.

Statement of the Case.

Action by the Bass Foundry & Machine Company, plaintiff, against Sulzberger & Sons Company, defendant, to recover the contract price of two water heaters. From a judgment for plaintiff, defendant appeals.

Bass Foundry & Mach. Co. v. Sulzberger & Sons Co., 205 Ill. App. 454.

ADAMS, CREWS, BOBB & WESTCOTT, for appellant.

MUSGRAVE, OPPENHEIM & LEE, for appellee.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 264*—*when warranty covers sufficiency of specifications.* In an action to recover the contract price of two water heaters, where the contract provided that the heaters must be guaranteed to contain sufficient square feet of heating surface to heat a required amount of water, and such heaters were operated in connection with the defendant's boilers for the utilization of exhaust steam to raise the temperature of the water before it was taken into the boilers, thereby effecting a saving of fuel, and, on the heaters being tested, it was discovered that they failed to meet the warranty, *held* that such warranty covered not only the workmanship and materials, but the sufficiency of the specifications as well, and the heaters having failed to fulfil the warranty, the trial court erred in excluding the defendant's evidence of recoupment.

2. SALES, § 404*—*what is measure of damages for breach of warranty as to heating efficiency of water heaters.* In an action to recover the contract price of two water heaters, where the defendant claimed in recoupment because of the breach of a warranty as to heating efficiency, and the warranty was not fulfilled, *held* that the measure of the defendant's damages was the difference between the value of the heaters furnished by plaintiff and the cost of altering the defect to make them conform to the warranty, plus a reasonable compensation for their use for the period of time necessary to make the alterations; but that if the cost of installing an auxiliary heater would be less than the damages as outlined, that method should be adopted in order to minimize the damages.

3. SALES—*what is effect of change in specifications prior to execution of contract on warranty.* In an action to recover the contract price of water heaters, where the defendant contended that such heaters failed to meet the warranty as to heating, *held* that the mere fact that certain changes were made in the specifications at the request of the defendant, prior to the execution of the contract, did not relieve plaintiff from liability under the warranty.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Krecun v. Rosenthal, 205 Ill. App. 456.

**Anna Krecun, Appellee, v. Samuel J. Rosenthal,
Appellant.**

Gen. No. 22,334. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOSEPH E. RYAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed May 1, 1917. Rehearing denied May 14, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Anna Krecun, plaintiff, against Samuel J. Rosenthal, defendant, for money had and received. From a judgment for plaintiff, defendant appeals.

ALEXANDER WOLOSHEW and ZOLINE & LEVINSON, for appellant; MORRIS K. LEVINSON, of counsel.

WILLIAM REEDA and LEVIN & KRINSKY, for appellee; HARRY H. KRINSKY, of counsel.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

1. ASSUMPSIT, ACTION OF, § 89*—*when evidence is sufficient to sustain verdict for plaintiff in action to recover money.* In an action to recover money, where plaintiff claimed that the amount in question had been deposited with the defendant for safe keeping while her husband was going through bankruptcy, and the defendant claimed that it was paid to him in payment of a debt owing to him from plaintiff's husband, evidence held sufficient to sustain a verdict for plaintiff.

2. ASSUMPSIT, ACTION OF, § 44*—*when ownership of money is immaterial.* In an action for money had and received, the question of the ownership of the money is immaterial, as such question can be raised only by the equitable owner.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Albaugh-Dover Company, Appellee, v. Stephen J. Napieralski, and Dr. Emmanuel F. Napieralski, Appellants.

Gen. No. 22,343. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. SAMUEL H. TAUBE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1916. Affirmed. Opinion filed May 1, 1917. Rehearing denied May 14, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Albaugh-Dover Company, plaintiff, against Stephen J. Napieralski and Dr. Emmanuel F. Napieralski, defendants, to recover on two promissory notes, of which defendants were alleged to be joint makers. From a judgment for plaintiff for \$2,114.20, defendants appeal.

L. D. CONDEE and M. H. GLADSTONE, for appellants.

FOSTER, PAINE, REYNOLDS & BRYANT, for appellee.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

1. **BILLS AND NOTES, § 440***—*when evidence is sufficient to sustain findings that notes were given as accommodation paper.* In an action on two notes against two defendants, where the defense on the part of both was that the notes were given for accommodation, and where one defendant claimed that there was due to him from plaintiff a sum in excess of the amount of the notes for commissions, and the other defendant claimed that he signed as surety, evidence held sufficient to sustain findings in favor of plaintiff that no specific amount was due from plaintiff to said one defendant for commissions, and that the notes were not given as accommodation paper.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Layden v. Miller, 205 Ill. App. 458.

2. **BILLS AND NOTES, § 270***—*what is effect of failure to give notice of dishonor to joint maker.* Even though an indorser of notes is a joint maker, his liability is not affected by the failure to give notice of dishonor.

3. **BILLS AND NOTES, § 274***—*what is effect of failure to give notice of dishonor to surety.* Even though an indorser of notes is a surety, he is not released from liability by the failure to give notice of dishonor.

4. **PRINCIPAL AND SURETY, § 14***—*when contention that surety was released from liability by extension of notes is untenable.* In an action on two notes against two defendants, where one of the defendants claimed that he signed the notes as surety and that he was released from liability because payment was extended without his knowledge or consent, held that, as the record was barren of any evidence tending to show that any binding agreement of extension had been entered into, such position was untenable.

Millie Reets Layden, Appellant, v. George P. Miller, Appellee.

Gen. No. 22,390. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed May 1, 1917.

Statement of the Case.

Bill by Millie Reets Layden, complainant, against George P. Miller, defendant, to enjoin the collection of a judgment in favor of defendant and against complainant. From a decree dissolving a temporary injunction and dismissing the bill for want of equity, complainant appeals.

ALANSON C. NOBLE, for appellant.

No appearance for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Layden v. Miller, 205 Ill. App. 458.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

1. JUDGMENT, § 343*—*when dismissal of bill to enjoin collection of on ground of fraudulent procurement is proper.* On a bill to enjoin collection of a judgment entered in an action at law brought originally against complainant and her husband to recover a certain balance for medical services, and affidavits denying liability, but alleging that the services were worth not exceeding a certain lesser sum, and judgment was entered for such sum, and the case continued as to the remainder, and, pending the reaching of the case for trial, the husband died and the suit was dismissed as to him without the death being suggested of record, and judgment for the balance was entered against complainant alone, and the bill charged that the latter judgment was entered through fraud and collusion between counsel for the respective parties, that complainant's counsel had no authority to consent to the entry thereof, and that it was entered without her knowledge, *held* that as the bill charged fraud and collusion without reciting facts or circumstances from which fraud could be inferred, a court of equity had no jurisdiction to set aside the judgment, and that the dismissal of the bill for want of equity was proper.

2. JUDGMENT, § 389*—*how defects in are to be taken advantage of.* Defects in a judgment by reason of irregularities are to be taken advantage of on appeal or writ of error, and not by a bill in equity.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Gypsum Fireproofing Co. v. Nelson & Lewin, 205 Ill. App. 460.

Gypsum Fireproofing Company, Appellee, v. Nelson & Lewin, Appellant.

Gen. No. 22,412.

MUNICIPAL COURT OF CHICAGO, § 13*—*when additional affidavit in support of statement of claim is necessary.* In an action in the Municipal Court of Chicago to recover the value of goods, where the action was originally brought by the United States Gypsum Company, a corporation, and a statement of claim was supported by the affidavit of a person described as the agent of the plaintiff, and an affidavit of merits was filed denying all liability, and subsequently the "Gypsum Fireproofing Company," a corporation, was substituted as plaintiff and no additional affidavit in support of the claim of the substituted plaintiff was filed, and defendant was ruled to file another affidavit of merits, and, upon failing to file such affidavit, a default judgment was entered, *held* that presumably the substituted plaintiff was a corporation distinct from the plaintiff; and as it did not appear that the agent whose affidavit supported the statement of claim was also the agent for the substituted corporation, proof of plaintiff's claim was indispensable, as the affidavit to the original statement of claim was not amended by such substitution of parties, and a default judgment was accordingly improperly entered.

Appeal from the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and remanded. Opinion filed May 1, 1917.

BEN M. SMITH, for appellant.

EASTMAN, WHITE & HAWKHURST, for appellee.

MR. JUSTICE McDONALD delivered the opinion of the court.

By this appeal it is sought to review and reverse a judgment entered in favor of appellee (plaintiff below) against appellant, for the value of certain goods, wares and merchandise alleged to have been sold by the former to the latter:

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The action was originally brought by the United States Gypsum Company, a corporation. The statement of claim was supported by the affidavit of one H. C. Dawson, who was therein designated as the "agent of the plaintiff." To this statement of claim the defendant filed an affidavit of merits denying any and all liability to the said United States Gypsum Company.

Subsequently, upon motion, the cause was amended by substituting as plaintiff the Gypsum Fireproofing Company, another corporation. No additional affidavit was filed in support of the claim of the substituted plaintiff. Defendant was then ruled to file another affidavit of merits within ten days, which it failed to do, whereupon a default judgment was entered against it in the sum of \$1,302.52.

The controlling question here presented for determination is, whether or not there is any evidence in the record to support the judgment complained of.

Presumably the United States Gypsum Company and the Gypsum Fireproofing Company are separate and distinct corporations, there being nothing in the record to indicate the contrary. Nor does it appear that the said Dawson was also the agent for the latter corporation. While the original affidavit made by the said Dawson stated that he was the agent of the plaintiff, yet from such recital it does not follow that he was also agent for the Gypsum Fireproofing Company; and although the pleadings were amended by the substitution of parties plaintiff, the affidavit could not be amended in this manner. (*Campbell v. Whetstone*, 4 Ill. (3 Scam.) 361; *Moorehead v. Briggs*, 152 Ill. App. 361.) Under such circumstances, proof of plaintiff's claim was indispensable, in the absence of which the court erred in entering a default judgment against the defendant. Accordingly the judgment must be reversed and the cause remanded.

Reversed and remanded.

Falls City Tannery v. W. D. Allen Mfg. Co., 205 Ill. App. 462.

Falls City Tannery, Appellee, v. W. D. Allen Manufacturing Company, Appellant.

Gen. No. 22,421. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOHN R. NEWCOMER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and remanded. Opinion filed May 1, 1917. Rehearing denied May 22, 1917.

Statement of the Case.

Action by Falls City Tannery, a corporation, plaintiff, against W. D. Allen Manufacturing Company, a corporation, defendant, to recover a balance alleged to be due on a shipment of hides. From a judgment for plaintiff for \$2,377.25, defendant appeals.

UNDERWOOD & SMYER, for appellant; ARTHUR A. BASSE and CHARLES R. YOUNG, of counsel.

WOODBURY & WOODBURY, for appellee.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

I. SALES, § 330*—*when instruction is erroneous as assuming proof of case by preponderance of evidence and as directing verdict.* In an action for money due upon a shipment of hides, where it was claimed in defense that the goods had been fraudulently treated so as to increase their weight, and the court charged the jury that the burden of proving fraud was on the defendant, and that unless such charge was proven by the clear preponderance of the evidence the jury should find for the plaintiff, *held* that such instruction was erroneous in assuming that plaintiff had proved his case by a preponderance of the evidence, and in directing a verdict for the plaintiff in the event that the defendant failed to show fraud on the part of the plaintiff.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Falls City Tannery v. W. D. Allen Mfg. Co., 205 Ill. App. 462.

2. SALES, § 325*—*when plaintiff must establish case by preponderance of evidence.* In an action for money due upon a shipment of hides, where it was claimed in defense that the goods had been fraudulently treated so as to increase their weight, and the court charged the jury that the burden of proving fraud was on the defendant, and that unless such charge was proven by a clear preponderance of the evidence the jury should find for the plaintiff, *held* that the plaintiff was required to establish his case by a preponderance of the evidence regardless of whether or not the defendant succeeded in establishing its charge of fraud.

3. INSTRUCTIONS, § 87*—*when instruction on preponderance of evidence is misleading.* In an action for money due upon a shipment of hides, where it was claimed in defense that the goods had been fraudulently treated so as to increase their weight, and the court charged the jury that the burden of proving fraud was on the defendant, and that unless such charge was proven by a clear preponderance of the evidence the jury should find for the plaintiff, *held* that such charge was misleading in requiring the defendant to prove fraud by a *clear* preponderance of evidence, as thus the burden was placed upon the defendant of establishing its defense of fraud by a higher degree of proof than required by the law, a mere preponderance being sufficient.

4. INSTRUCTIONS, § 87*—*when instruction on amount of proof to show fraud by seller of goods is erroneous.* In an action for money due upon a shipment of hides, where it was claimed in defense that the goods had been fraudulently treated so as to increase their weight, and where the court charged the jury that unless they were satisfied from the evidence that the plaintiff dried certain so-called belt butts for the purpose of intentionally deceiving the defendant they should find for the plaintiff, *held* that the instruction was prejudicially erroneous, as it was not necessary for the defendant to submit evidence that would *satisfy* the jury.

5. MUNICIPAL COURT OF CHICAGO, § 29*—*when judicial notice not taken of rules of.* In an action in the Municipal Court to recover upon a shipment of goods, where the defendant complained of the charge to the jury, and where the plaintiff contended that the defendant was precluded from assailing the instruction of the court because no objection was made at the close of the charge before the jury retired, as required by the rules of the Municipal Court, and where such rules were not introduced in evidence, *held* that such point was untenable as the court could not take judicial notice of such rules.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Nicholas J. Rauen, Appellee, v. Chicago Railways Company, Appellant.**Gen. No. 22,441.**

1. **STREET RAILROADS, § 144***—*when instruction on anticipation of negligence by automobile driver is not reversibly erroneous.* In an action to recover for damages to an automobile caused by a collision with a street car, where an instruction was given stating that individuals were not obliged to anticipate negligence in others and govern their movements by such rule, that plaintiff had the right to assume that in propelling the cars the defendant would act with reasonable care and that action by the plaintiff upon that assumption was not a failure to exercise due care on his part, and defendant contended that plaintiff had no right to rely upon any such assumption in view of his admission that he proceeded into a position of danger after becoming aware of the proximity of the car, *held* that, as the evidence tended to show that when plaintiff first saw the car he endeavored to avoid a collision, and in view of all the circumstances, it could not be said that he negligently proceeded into a position of danger with full knowledge of its existence relying upon such presumption, and that, although the instruction was somewhat inaccurate, its giving constituted only harmless error.

2. **DAMAGES, § 236***—*who may take advantage of compromise of verdict.* In an action for damages to an automobile caused by a collision with a street car, where the defendant claimed that the jury compromised the question of damages by reducing them from \$556.21, as shown by the undisputed evidence, to \$390, *held* that such discrepancy could be taken advantage of only by the injured party.

3. **STREET RAILROADS, § 131***—*when evidence is sufficient to sustain verdict for plaintiff in action for damage to automobile by collision.* In an action to recover for damage to an automobile, sustained in a collision with defendant's car at a street crossing, where the car was proceeding north and the automobile west, and both east corners were occupied by buildings which came out to the building line, and plaintiff claimed that he reduced his speed to about twelve miles an hour, and as he approached the tracks he was on the alert for cars, that as he cleared the building line he saw a northbound car about one hundred and fifty to two hundred

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

feet to the south of the intersection, approaching at an estimated speed of about twenty-five to forty miles an hour, and then applied his brakes and, realizing that he could not "make it," suddenly turned his automobile north, which caused it to skid into the path of the street car, and the testimony as to the speed of the car was contradictory, *held* that the verdict in favor of plaintiff was not manifestly against the weight of the evidence.

4. STREET RAILROADS, § 113*—*when evidence as to ringing of bell is competent as bearing on contributory negligence of automobile driver.* In an action to recover for damage to an automobile sustained in a collision with defendant's car at a street crossing, where the car was proceeding north and the automobile west, both east corners were occupied by buildings which came out to the building line, and plaintiff claimed that he reduced the speed to about twelve miles an hour, and as he approached the tracks he was on the alert for cars, and as he cleared the building line he saw a northbound car about one hundred and fifty to two hundred feet to the south of the intersection approaching at an estimated speed of about twenty-five to forty miles an hour, then applied his brakes, and, realizing that he could not "make it," suddenly turned his automobile north, which caused it to skid into the path of the street car, and defendant claimed that the evidence as to the ringing of the bell was immaterial for the reason that plaintiff was aware of the approach of the car, *held* that such testimony was competent as bearing on the question whether plaintiff, having failed to hear any warning as he approached the crossing, was negligent in increasing his speed preparatory to crossing the tracks.

Appeal from the County Court of Cook county; the Hon. H. B. EATON, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed May 1, 1917.

EDWARD C. STEARNS and FRANK L. KRIETE, for appellant; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

MECHEM, BANGS & HARPER, for appellee.

MR. JUSTICE McDONALD delivered the opinion of the court.

By this appeal it is sought to reverse a judgment entered in favor of appellee for damages to his auto-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

mobile received in a collision with one of appellant's cars. The negligence charged is that appellant operated its car in a negligent manner. Hereinafter we shall designate appellee and appellant as plaintiff and defendant, respectively.

The mishap complained of occurred on the evening of January 28, 1913, after dark, at the intersection of Ashland and Wabansia avenues, in the city of Chicago.

Ashland avenue runs north and south. Defendant's tracks occupy the center of the thoroughfare, its northbound cars being operated on the east track, and the southbound on the west track. Wabansia avenue runs east and west, crossing Ashland avenue at right angles. Both corners on the east side of Ashland avenue, as well as the adjoining lots to the north and south thereof, are occupied by buildings fronting on Ashland avenue, which extend to the building or lot line.

Plaintiff's automobile was moving in a westerly direction on Wabansia avenue. His testimony tends to show that as he neared Ashland avenue he reduced the speed of his automobile to about eight or nine miles per hour; that, hearing no warning of an approaching street car, he increased his speed to about twelve miles per hour; that as he approached nearer the tracks he was constantly on the alert, looking both to the north and south; that as he cleared the building line, he looked to the left and observed a northbound car about one hundred and fifty to two hundred feet south of the intersection, approaching at a speed estimated by him at about forty miles per hour; that he applied his brakes, which appeared to be working properly, and realizing that he could not "make it" he suddenly turned his automobile north in Ashland avenue, which caused it to swerve or skid into the path of defendant's car.

Four witnesses testified as to the probable speed of defendant's car just prior to the collision. According to the version of defendant's witnesses—the motor-man and conductor in charge of the car in question—it was proceeding at the rate of from eight to ten miles per hour, while the testimony given on behalf of plaintiff would tend to show that it was going at the rate of from twenty-five to forty miles per hour.

Defendant contends that the court erred in admitting evidence on the question whether or not, just prior to the impact, a bell was sounded on defendant's car. It is argued that plaintiff having testified that he saw the car when it was one hundred and fifty to two hundred feet south of the intersection, he was evidently aware of its approach, and hence it was immaterial whether the bell was rung or not.

It will be noted from plaintiff's testimony that when he neared Ashland avenue and slackened the speed of his automobile, his view of Ashland avenue was obstructed by buildings, so he listened for the sound of an approaching car. If, as testified, he failed to hear such warning, it was for the jury to determine whether he was negligent in increasing his speed preparatory to crossing the tracks. Clearly, therefore, the evidence complained of was competent as bearing on this question.

It is also urged that the court erred in giving the following instruction on behalf of the plaintiff:

"The jury are instructed that individuals are not obliged to anticipate negligence in others and govern their movements by such rule. Applying the law to this case the plaintiff had a right to assume that in propelling its cars the defendant would act with reasonable care and it was not a failure on the part of the plaintiff to exercise due care, for him to act upon that assumption."

In support thereof, defendant argues that plaintiff, by his own testimony, admitted having proceeded into

a position of danger after becoming aware of the proximity of this rapidly-moving car, and hence he had no right to rely upon the foregoing presumption. Particular stress is laid upon the following testimony given by plaintiff.

"Q. If you were running that machine with those new tires, and all, your brakes in good condition and with your experience, the number of years in running a car, suppose you were going ten or twelve miles an hour; with all this experience you have had, what is the shortest distance you could stop that car, applying your emergency? A. I would be able to stop it in five or six feet."

This testimony does not purport to have any reference to the time and place in question, or the then condition of the street, nor was plaintiff required to stop his car within the shortest possible distance. The evidence tends to show that when plaintiff first saw defendant's car he applied his brakes; that, realizing the futility of attempting to either stop his automobile or to cross the track ahead of defendant's car, he turned north into Ashland avenue to avert a disaster which seemed imminent. Under such circumstances, it cannot be said that plaintiff negligently proceeded into a position of danger with full knowledge of its existence, relying upon the foregoing presumption. Although the instruction complained of was somewhat inaccurately drawn, yet in view of the evidence we are of the opinion that the giving thereof constituted only harmless error.

The jury may reasonably have concluded that defendant was operating its car at a negligent rate of speed; that defendant's motorman failed to sound the bell, which omission caused plaintiff to accelerate his automobile after he had retarded its speed and listened for the sound of an approaching car; that when he saw defendant's car moving along at a high rate of speed, it was too late to stop his automobile; and

that he made a sharp turn into Ashland avenue to avert a collision.

After a most careful examination of the record and due consideration of all the evidence contained therein, we cannot say that the verdict was clearly and manifestly against the weight of the evidence.

Finally it is complained that in arriving at their verdict the jury compromised the question of damages by reducing them from \$566.21, as shown by the undisputed evidence, to \$390. Such discrepancy can be taken advantage of only by the injured party. 38 Cyc. 1904.

Finding no error in the record which justifies a reversal, the judgment will be affirmed.

Affirmed.

Jacob Bass, Defendant in Error, v. William T. Woodley, Plaintiff in Error.

Gen. No. 22,106. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDMUND K. JARECKI, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1917. Affirmed. Opinion filed May 1, 1917. Rehearing denied May 14, 1917.

Statement of the Case.

Action by Jacob Bass, plaintiff, against William T. Woodley, defendant, to recover for rent on a written guaranty of a lease. From a judgment for plaintiff for nine hundred dollars, defendant brings error.

BLUM, WOLFSOHN & BLUM, for plaintiff in error.

Bass v. Woodley, 205 Ill. App. 469.

DARROW & SISSMAN, for defendant in error.

MR. JUSTICE McGOORTY delivered the opinion of the court.

Abstract of the Decision.

1. **GUARANTY, § 7***—*when of lease is supported by consideration.* In an action to recover for rent on a written guaranty (not under seal) of a lease, where it appeared that plaintiff purchased the premises from the defendant subject to existing leases, including the one in question, and it was contended by plaintiff that such purchase was conditioned upon a guaranty of the rents by the defendant and that such guaranty was agreed to prior to the execution of the contract of purchase, and it appeared that such guaranty was contained in the same instrument which assigned the lease in question and was delivered to plaintiff with the deed, and where the real question was whether there was a consideration for the guaranty, *held* that the execution and delivery of the said documents constituted one transaction and were supported by the same consideration.

2. **DEEDS, § 196***—*when parol evidence is admissible to show consideration.* While parol evidence is not admissible to vary or contradict the terms of a deed, yet such evidence may be introduced to show the true consideration recited in the deed.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Samuel H. Thompson, Plaintiff in Error, v. Chicago City Railway Company, Defendant in Error.

Gen. No. 22,142. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. WILLIAM B. SCHOLFIELD, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed May 1, 1917.

Statement of the Case.

Action by Samuel H. Thompson, plaintiff, against the Chicago City Railway Company, defendant. From a judgment for defendant, plaintiff brings error.

DILLARD B. BAKER, for plaintiff in error.

J. R. GUILLIAMS and FRANK L. KRIETE, for defendant in error.

MR. JUSTICE MCGOORTY delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1751*—*when judgment will be affirmed because of lack of bill of exceptions.* Where on an appeal there was no bill of exceptions in the record, and the points relied upon were predicated upon recitals in the clerk's transcript of a motion for a new trial and affidavits in support thereof, which upon motion had been stricken from the record because such recitals were not properly a part thereof, held that there being nothing before the court for determination, the judgment of the lower court would be affirmed.

2. APPEAL AND ERROR, § 800*—*what must be preserved by bill of exceptions.* A motion for new trial and the rulings of the court thereon can only be preserved in the record by a bill of exceptions.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Wilber et al. v. Giuseppe et al., 205 Ill. App. 472.

3. APPEAL AND ERROR, § 760*—*when affidavits are part of record.* Affidavits are a part of the record only when they are brought into it by a bill of exceptions, and they are not made a part of the record merely by being copied into the record by the clerk and certified by him.

W. S. Wilber and O. H. Inness, trading as Wilber & Inness, Defendants in Error, v. Giuseppe and Filippo Mirabella, trading as G. Mirabella & Company, Plaintiffs in Error.

Gen. No. 22,153. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed May 1, 1917.

Statement of the Case.

Action by W. S. Wilber and O. H. Inness, trading as Wilber & Inness, plaintiffs, against Giuseppe and Filippo Mirabella, trading as G. Mirabella & Company, defendants. From a judgment for plaintiffs for \$611.56, defendants bring error.

DE STEFANO & MIRABELLA and CHARLES HUGHES, for plaintiffs in error.

LAMBERT KASPERS, for defendants in error.

MR. JUSTICE McGOERTY delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 329*—*when evidence is sufficient to sustain verdict for plaintiff in action for purchase price of produce.* In an action to recover the contract price for two carloads of potatoes, where

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

the only questions were whether the sale was unconditional or dependent upon quality, and whether the sale was by invoice weight or scale weight, *held* that the verdict in favor of plaintiff was not against the manifest weight of the evidence.

2. SALES, § 142*—*when purchaser is bound by inspection made.* In an action to recover the contract price for two carloads of potatoes, where the question of acceptance was in controversy, and it appeared that the potatoes, which were in open sacks, had been in part examined by the defendants, *held* that the question was not whether there actually was a thorough inspection, but whether there was a reasonable opportunity for such inspection before acceptance, and as the defendant had such opportunity and did in part inspect, the judgment in favor of plaintiff would be affirmed.

Albert M. Wolf, Defendant in Error, v. Railway List Company, Plaintiff in Error.

Gen. No. 22,297.

ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 130*—*who is not laborer or servant entitled to preference.* A civil engineer by profession, who is employed to prepare scientific articles for publication after study and sometimes to inspect the subjects concerning which the articles are written, writes the articles in long hand, reads the proofs after they had been set in type, cuts up the galley sheets and pastes them in a "dummy," is not a laborer or servant within chapter 38a, Hurd's Rev. St. 1915 (J. & A. ¶ 7193 *et seq.*), giving priority to claims of laborers, in case of suspension of business by action of creditors or as the result of a debtor's business being put in the hands of a receiver or trustee.

Error to the Municipal Court of Chicago; the Hon. JOHN J. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and judgment here. Opinion filed May 1, 1917.

CHARLES F. MCKINLEY, for plaintiff in error.

HENRY M. HAGAN, for defendant in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Wolf v. Railway List Co., 205 Ill. App. 473.

MR. JUSTICE McGOORTY delivered the opinion of the court.

In this action a judgment for \$224 was recovered by plaintiff for wages due as a laborer. Defendant was the publisher of a periodical known as "Railway Engineering" and plaintiff was in its employ as associate editor prior to March, 1915, at which time defendant ceased to do business and transferred all of its assets to trustees for the benefit of its creditors.

Plaintiff was a civil engineer by profession, and his duties as associate editor for defendant were to prepare scientific articles for publication after study and sometimes inspection of the subjects concerning which the articles were written. He wrote such articles in long hand, and, after same were set in type, read the proof, cut up the galley sheets and pasted them in the "dummy." Plaintiff further testified that before writing a special article for defendant on track elevation, which is included in the services for which recovery is sought, he examined said track elevation and made certain measurements in relation thereto.

The only question presented for our determination is, was plaintiff entitled to a judgment for wages as a laborer or servant, thereby giving him a preference in the payment of his claim against defendant?

It is defendant's contention that, under the evidence presented, plaintiff was not a laborer or servant within the meaning of chapter 38a, Hurd's Rev. St. 1915 (J. & A. ¶ 7193 *et seq.*), which, so far as applicable, is as follows:

"That hereafter, when the business of any person, corporation, company or firm shall be suspended by the action of creditors, or be put into the hands of a receiver or trustee, then in all such cases the debts owing to laborers or servants which have accrued by reason of their labor or employment shall be considered and treated as preferred claims, and such laborers or employes shall be preferred creditors, and shall

Wolf v. Railway List Co., 205 Ill. App. 473.

be first paid in full, and if there be not sufficient to pay them in full the same shall be paid from the proceeds of the sale of the property seized."

The Supreme Court in *Heckman v. Tammien*, 184 Ill. 144, said:

"* * * we are disposed to hold that the statute must be confined to these who perform manual services, * * *. *P. & D. R. R. Co. v. Leuffer*, 84 Pa. St. 168; *Stryker v. Cassidy*, 76 N. Y. 50; *Palmer v. Van-Santvoord*, 153 N. Y. 612."

In *Weymouth v. Sanborn*, 43 N. H. 171, the court, in discussing a similar statute, defines a laborer as one who subsists by physical toil, in distinction from one who subsists by professional skill.

We are clearly of the opinion that plaintiff was not a laborer or servant in the sense contemplated by the statute and that the judgment to that extent is erroneous. The judgment of the Municipal Court will be reversed, and judgment entered here for \$224, the plaintiff (defendant in error here) to pay the costs here.

Judgment reversed and judgment here.

Coster v. Ullrich, 205 Ill. App. 476.

Estella M. Coster, Executrix, Appellee, v. Henry Ullrich, Appellant.

Gen. No. 21,969. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. M. L. McKINLEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded. Opinion filed May 9, 1917.

Statement of the Case.

Action in assumpsit by Estella M. Coster, executrix of the estate of Henry P. Coster, deceased, plaintiff, against Henry Ullrich, defendant. From a judgment for \$2,230 in favor of plaintiff, defendant appeals.

MORTON T. CULVER, for appellant.

BENJAMIN F. BARTEL, for appellee.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

ASSUMPSIT, ACTION OF—*when recovery may not be had under common counts.* In an action of assumpsit to recover money alleged to be due, where it appeared that plaintiff's testator and the defendant, who was engaged in the real estate business, had had various transactions together resulting eventually in an agreement to exchange the equity in a farm owned by the deceased, for certain lots, for the purchase of which the defendant held a contract, and where plaintiff filed special counts alleging that the money in question was due from the sale of a farm and that the defendant refused to account for the same, and there was no evidence to support such counts, and plaintiff then relied upon the common counts, *held* that, as plaintiff was seeking to recover purchase money paid on account of the farm and at the same time was retaining the contract for the purchase of the lots, there could be no recovery under the common counts.

**Mary Louise King et al., Appellees, v. Fred J. Bush and
Emma B. Shirley, Appellants.**

Gen. No. 22,007. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WYNDES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed May 9, 1917.

Statement of the Case.

Bill of interpleader by the Royal Arcanum, complainant, against Mary Louise King, Fred J. Bush and Emma B. Shirley, defendants, to determine title to the proceeds of a policy of insurance. From a decree in favor of defendant Mary Louise King, defendants Fred J. Bush and Emma B. Shirley appeal.

DOUGLAS C. GREGG, for appellants.

CASWELL & HEALY and THOMAS J. HEALY, for appellees.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1271*—*when presumed that evidence justified decree.* On a bill of interpleader to determine which of several claimants was entitled to the proceeds of a benefit certificate, where the insured surrendered the certificate several times, and where the defendants contended that the decree was erroneous in failing to find the mental condition of the insured at the time the certificate in which they were named as beneficiaries was surrendered, and that both the decree and the master's report were silent upon such point, and that such error was not cured by a finding that the insured was of sound mind at a later date, and the record disclosed that the testimony before the master was

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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made a part of his report and filed, but that it was not contained in the record on appeal, *held* that every intendment was in favor of the correctness of the decree, and that it must be assumed, in the state of the record, that if any finding such as was contended for had been necessary, the evidence justified a finding that the decedent was of sound mind at the time in question.

2. EQUITY, § 515*—*when specific findings of fact are unnecessary.* Specific findings of fact in a decree are unnecessary where the evidence is preserved.

**United States Brewing Company, Appellee, v. Dolese
& Shepard Company, Appellant.**

Gen. No. 22,015.

1. IMPROVEMENTS, § 6*—*what considered in determining value of improvements and cost.* The rule that the reasonable value of improvements on real estate is to be determined by the enhanced value of the real estate on which the improvements are made has no application where such improvements are made at the special instance and request of the owner. In such case the proper method of valuation was to arrive at the value of the improvements and the cost at the time they were made, and the depreciation from the time of construction to the date in question.

2. ASSUMPSIT, ACTION OF, § 44*—*when lies.* An action of assumpsit to recover the reasonable value of improvements is equitable in its nature, and lies whenever a defendant has obtained money or property of the plaintiff which, in equity and good conscience, he has no right to retain.

3. APPEAL AND ERROR, § 1725*—*when decision on former appeal is binding.* The decision of the Supreme Court on a former appeal that an action lies to recover the reasonable value of improvements by a tenant is binding on a subsequent trial.

4. IMPROVEMENTS, § 6*—*when owner of land liable for reasonable value of.* In an action of assumpsit by the erector and tenant of a building to recover the value thereof from the owner of the land, where the Supreme Court had on a former appeal decided that plaintiff was entitled to recover the reasonable value of such build-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ing as of a certain date, and where it appeared that the building had been erected at the defendant's instance, and where the contract had been held *ultra vires* by the Supreme Court, but not *malum in se* nor *malum prohibitum*, and the building had been erected for use as a boarding house by the defendant without expense to it, and where the agreement of the parties contemplated payment to the plaintiff, *held* that, as the action being for the recovery of reasonable improvements was equitable in its nature, every principle of equity and fair dealing required that the defendant should pay the reasonable value, based upon the value and cost of the improvements when they were made and the depreciation from the time of construction to the date in question.

5. INTEREST, § 20*—*when allowed to person advancing money.* Where, in an action of assumpsit by the erector and tenant of a building to recover the value thereof as of a certain date, plaintiff had tendered the improvements to the defendant on such date, and the money of the plaintiff had been advanced in the erection of the improvements for the use of the defendant, and defendant contended that the damages were unliquidated and that there had been no vexatious delay in payment, and that therefore plaintiff was not entitled to interest, *held* that under the circumstances and for the reason that the action was equitable in its nature, interest was properly allowed.

GOODWIN, J., dissenting.

Appeal from the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed May 9, 1917. Rehearing denied May 24, 1917.

WILLIAM J. PRINGLE and EDWIN TERWILLIGER, JR.,
for appellant.

WINSTON, PAYNE, STRAWN & SHAW, for appellee;
WALTER H. JACOBS, of counsel.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

The United States Brewing Company, a corporation, brought suit against Dolese & Shepard Company, a corporation, in the Municipal Court of Chicago, and

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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obtained a judgment for \$11,103.07, to reverse which defendant prosecutes this appeal.

The evidence disclosed that plaintiff is a corporation chartered to manufacture and sell beer, ale and porter, and carry on a general brewer's business; that the defendant is a corporation organized to quarry stone, and owns and operates quarries which are located in the country about fifteen miles from the business district of Chicago, not near any centers of population. In 1905, defendant employed at its quarries about one hundred or one hundred and fifty men who were housed in a boarding house erected by the defendant near its quarries. The building was old and out of repair, and it became necessary that a new and larger boarding house be erected, and the defendant thereupon employed an architect to prepare plans and specifications for such building. The defendant also prepared a contract with specifications and asked for and received bids from contractors on the proposed improvements. Shortly afterwards, and before any work was done on the building, defendant explained the location of defendant's quarry and the necessity for a new boarding house, and suggested that plaintiff, at its own expense, construct the boarding house on defendant's property, and use a part of the building as a saloon and thereby secure a market for its products. Afterwards a written lease was entered into between the parties substantially embodying defendant's proposition. The lease covered a period of about twenty-four years. It provided, among other things, that plaintiff would erect at its own expense, and maintain for the entire term, unless the lease was sooner terminated, the boarding house, at an estimated cost of \$6,700; that if the building was damaged or destroyed by fire, plaintiff would rebuild and keep the same in good condition. The lease further provided that the defendant had the option at any time to cancel the

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lease upon five days' notice in writing; that if such notice were given, appraisers should be appointed who should examine the premises, fixtures and contents of the building and arrive at a fair, just and reasonable valuation of the improvements, as of the time such examination was made; that upon the payment of the amount of the appraisal by defendant, plaintiff should surrender possession of the building, and it should thereafter belong to the defendant. There was a further provision that if the defendant elected to terminate the lease, within three years from the date, or if the district where the building was located should become prohibition or local option territory within such period, so that a saloon could not be operated in the building, "then no such appraisalment shall be made but said first party shall pay to said second party the cost price of the building and improvements on said premises, such cost price not to exceed, however, the sum of \$10,000. Said second party shall deliver, immediately upon payment, all receipts or copies thereof for all expenditures which might be a part of the above mentioned cost price. And failure to so deliver any such receipts or copies shall preclude said second party from including the amounts of any such receipts in said cost price."

In accordance with the provisions of the lease, the plaintiff constructed the improvements at its own expense, and thereafter the building was conducted as a boarding house and saloon. Within three years after the execution of the lease, at an election held April 7, 1908, the township of Lyons, within which the building was located, became prohibition or anti-saloon territory, and two days thereafter, plaintiff notified the defendant to that effect and demanded payment of \$10,000, the cost price of the building and improvements, and offered to surrender the building upon such payment being made. Defendant asked plaintiff to

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produce the vouchers showing the expenditures made in the construction of the improvements, and they were sent to the defendant. Defendant failed to make the payment and this suit was brought.

The declaration consisted of a special count on the lease, and the common counts. One of the defenses interposed was that the lease was *ultra vires* the plaintiff. The trial court sustained this contention, but held that plaintiff was entitled to recover the cost price under the common counts, and there was a judgment in favor of the plaintiff, from which the defendant prosecuted an appeal to this court, where the judgment of the Municipal Court was reversed, but the cause was not remanded (174 Ill. App. 394). A writ of certiorari was allowed by the Supreme Court, and the judgments of the Appellate and Municipal Courts were reversed and the cause remanded to the Municipal Court for a new trial (259 Ill. 274). The Supreme Court held that the lease or contract entered into between the parties was void, as it exceeded the charter powers of the plaintiff, but that plaintiff was entitled to recover the reasonable value of the building as of the time of the termination of the contract, May 7, 1908. Upon being redocketed in the Municipal Court, plaintiff withdrew the special count and the cause went to trial on the common counts. The trial was before the court without a jury, who found that the reasonable value of the building and improvements on May 7, 1908, was \$8,250; that plaintiff was entitled to recover this sum, together with interest thereon at five per cent. per annum from that date.

Counsel for defendant have advanced numerous reasons why the judgment should be reversed, all of which we have carefully considered. All of the questions raised by the defendant, except one, are settled by the decision of the Supreme Court in this case, adversely to defendant's contentions, and of course are not open for further discussion or argument.

The Supreme Court held that plaintiff was entitled to recover the reasonable value of certain improvements as of May 7, 1908. Counsel for defendant, however, contend that on this question the trial court adopted a wrong method in arriving at such reasonable value. Defendant's position as stated by its counsel is: "If there can be any recovery at all, it is only for the enhanced value of the real estate due to the erection of the improvements thereon, on the theory that it has become a part of the real estate and title thereto has become vested in the defendant. All decisions uniformly hold that such recovery cannot be had by the erector of the improvements in an action brought by him, but that he is entitled to the enhanced value when suit is brought against him to deprive him of his possession of the real estate, and then the recovery is limited to the enhanced value." In support of this contention counsel cite, among other cases, *Williams v. Vanderbilt*, 145 Ill. 238, where it is said (p. 251):

"There was here no express contract between appellant and appellee, nor do we think there is any implied contract to pay for the repairs or improvements. As a general rule, improvements of a permanent character, made upon real estate and attached thereto, without the consent of the owner of the fee, by one having no title or interest, become a part of the realty and vest in the owner of the fee. (*Mathes v. Dobschuetz*, 72 Ill. 438.) In equity, where one makes improvements innocently, or through mistake, upon the land of another, he will not ordinarily be allowed to enforce a claim for reimbursement *as an actor*; but when the true owner seeks relief in equity, as, for instance, to set aside a sale of the land on which the improvements have been made, or to obtain an accounting for rents and profits, he may be required to make compensation for the improvements upon the principle that he who seeks equity must do equity. (*Ebelmesser v. Ebelmesser*, 99 Ill. 541; 3 Pom. Eq. Jur. sec. 1241 and

United States Brew. Co. v. Dolese & Shepard Co., 205 Ill. App. 478.

note.) Even in such case, compensation will only be allowed for the increased value caused by the improvements."

Counsel's position, as stated by him, is undoubtedly the law, but manifestly has no application to the facts in the case at bar. His position is that where a person erects improvements on the land of another without the owner's consent he cannot maintain an action to recover for the improvements—he cannot become an actor. In the case at bar, the improvements were erected by plaintiff not without defendant's consent, but at defendant's special instance and request, and our Supreme Court in this very case has specifically held that plaintiff can maintain his action—can become an actor to recover the reasonable value of the improvements so made. It is clear, therefore, that defendant's contention that the reasonable value of the improvements is to be determined by the enhanced value of the real estate is not applicable to this case.

Witnesses testified on behalf of plaintiff to the value of the improvements and the cost thereof at the time they were made, and also the depreciation from the time of the construction to May 7, 1908, which testimony tended to establish the value of the building on the latter date. This, in our opinion is the proper method, under the facts in this case, of determining the reasonable value of the improvements. Substantially the same method was followed in the case of *Pullman's Palace Car Co. v. Central Transp. Co.*, 171 U. S. 138, cited by the Supreme Court in its opinion in this case.

The instant case is an action of assumpsit to recover the reasonable value of the improvements. Such an action is equitable in its nature, and lies whenever defendant has obtained money or property of the plaintiff, which, in equity and good conscience, he has no right to retain. *Trumbull v. Campbell*, 8 Ill. (3 Gilm.) 502; *Board Sup'rs Stephenson Co. v. Manny*,

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56 Ill. 160; *Crawford v. Schmitz*, 139 Ill. 564; *Fay v. Slaughter*, 194 Ill. 157.

In the *Crawford* case, *supra*, it was held that the action of assumpsit was of an equitable nature, in which plaintiff may recover from the defendant what in equity and good conscience he ought not to retain; and in the *Fay* case, *supra* (p. 163), the court said:

“This is an action upon the common counts for money had and received. It is in the nature of an equitable proceeding at law. ‘The principle governing in such case is, that the possession of money has been obtained which cannot conscientiously be withheld. Such an action is designed for the advancement of justice, and it is applicable where a person receives money which in equity and good conscience he ought to refund.’”

Applying the rule as announced by the Supreme Court to the facts in the case at bar, we find that the defendant found it necessary to construct a new and larger boarding house to house its men near its quarries; that it had employed an architect who prepared plans and specifications; that it solicited and received bids for the construction of the boarding house; that at its own instance and request plaintiff was induced to enter into the invalid contract, which the Supreme Court held was not *malum in se* nor *malum prohibitum*, but was only beyond the charter powers of plaintiff; that the boarding house was constructed and paid for without expense to the defendant. Under these circumstances every principle of equity and fair dealing requires that the defendant should pay the reasonable value thereof to the plaintiff, according to the method adopted by the trial court.

Defendant next contends that the court erred in allowing interest, on the ground that interest is never allowable except by statute; that the damages were unliquidated, and there was no unreasonable or vexatious delay in payment. Plaintiff tendered the improve-

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ments to the defendant May 7, 1908; the reasonable value of them was fixed as of that date, and plaintiff having advanced the money for the use of the defendant, and this action being equitable in character, plaintiff was entitled to interest. *Leigh v. American Brake-Beam Co.*, 205 Ill. 147; *Brennan v. Gallagher*, 199 Ill. 207; *St.-Patrick's Catholic Church of Sterling v. Daly*, 116 Ill. 76; *Cease v. Cockle*, 76 Ill. 484; *Perin v. Parker*, 126 Ill. 201.

The judgment of the Municipal Court of Chicago is affirmed.

Affirmed.

MR. JUSTICE GOODWIN dissenting:

I am unable to concur in the conclusions reached by the majority of the court. As the building in question was put upon the premises by appellee under an *ultra vires* contract, it cannot resort to the terms of that contract in determining the amount which it is entitled to recover. It would seem to be clear that as the contract was *ultra vires* it must, so far as the matter of a recovery is concerned, be treated as a nullity. Appellant and appellee entered into an illegal agreement, the result of which was that on a certain day appellant came into possession of a building constructed by appellee. The Supreme Court has decided that in the circumstances appellant is obligated to pay appellee the value of the building; this, as the Supreme Court pointed out, does not necessarily mean its cost, since obviously the building, at the time it came into possession of appellant, might be entirely useless, or worth even more than its original cost. The Supreme Court, it seems to me, has placed appellant in the same situation as any party to an illegal contract, who has, under its terms, come in the possession of money or property for which the other party has received no compensation. In such a case, no resort can be had to the terms of the contract, but the

party unjustly enriched must restore the money in the one case, or pay the reasonable value of the property in the other. The reasonable value of property, real or personal, is, of course, what it is worth when it is put to its highest and best use. Presumably, a building is worth most as an improvement to the real estate upon which it is placed, although this, of course, is subject to exceptions. Appellee offered evidence of the cost of the building less depreciation, while appellant offered proof of the extent to which they increased the value of the premises. Appellant's testimony, although uncontradicted, was disregarded, and a judgment entered for the cost of the improvement less depreciation, although there was no evidence that the property had any value except as an improvement to the realty upon which it was placed.

For the reasons already indicated, I am of the opinion that this action of the court was erroneous. I am also of the opinion that the recovery in this case is not for "money lent or advanced for the use of another," and that the case in no way comes within the terms of the statute in regard to interest, and that, in consequence, the inclusion of interest was also erroneous.

Levi v. Beadles et al., 205 Ill. App. 488.

David Levi et al., Appellees, v. Charles R. Beadles and Robert D. Beadles, Appellants.

Gen. No. 22,023. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. ABEL J. PRITT, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed in part, reversed in part and remanded with directions. Opinion filed May 9, 1917. Rehearing denied May 22, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Bill by David Levi and others, complainants, against Charles R. Beadles and Robert D. Beadles, defendants, to foreclose a trust deed. From a decree awarding a foreclosure in the form of a warranty deed given as security, defendants appeal and complainant Levi assigns cross-errors.

HENRY W. LEMAN and FRANK H. CULVER, for appellants.

GROSSBERG & HAFFENBERG, for appellee Levi.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. MORTGAGES, § 532*—*when decree of foreclosure affirmed in part.* On a bill to foreclose a trust deed where such foreclosure was denied on the ground that the trust deed had not been purchased by the complainant but that he had obtained possession thereof by subterfuge, and foreclosure of a mortgage in the nature of a warranty deed given as security was decreed in favor of complainant, allowances being made in the decree to various parties for moneys due in connection with the carrying on of the various transactions and the erection of a building on the premises, and both parties being

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Levi v. Beadles et al., 205 Ill. App. 488.

dissatisfied an appeal was perfected by one and cross-errors assigned by the other, *held* that the decree should be affirmed excepting as to a certain allowance for master's fees.

2. EQUITY, § 401*—*when taxing of master's fees as costs is improper*. On a bill to foreclose a trust deed where such foreclosure was denied, but foreclosure of a mortgage in the form of a warranty deed given as security was decreed and claims of various parties for moneys due in connection with the carrying on of the various transactions and the erection of a building on the premises were determined, and it appeared that the master who took the testimony and made his report died prior to the entry of the decree, and the court requested another master to draft the same, and there appeared to have been no order of reference to the latter master, *held* that the taxing of an allowance of \$250 for the drafting and redrafting of such decree as costs was improper.

3. EQUITY, § 396*—*when increase in allowance of fees to master is proper*. On a bill to foreclose a trust deed where such foreclosure was denied, but a foreclosure of a mortgage in the form of a warranty deed given as security was decreed, and claims of various parties for moneys due in connection with the making of the various transactions and the erection of a building on the premises were determined, and defendant claimed that it was error to allow \$2,500 to a master who had only requested \$2,000, and it appeared that before such master had prepared his report and before he had made up an estimate of charges he died, and his successor filed a supplemental report itemizing the services rendered by the deceased master and stating that in his opinion such services were reasonably worth \$2,000, *held* that the amount of fees to be allowed to a master as stated in his report was not conclusive on the chancellor, and that he might decrease or increase them, and as the record was in six parts and was certified as having been prepared *per praeceptum*, the court was unable to say whether the record was complete, and that it could not say that the allowance was not authorized.

4. COSTS, § 8*—*when assessment against complainant is proper*. Where foreclosure of a trust deed was denied to the complainant but foreclosure of a mortgage in the nature of a warranty deed given as security was awarded to him, and such complainant objected to the assessment to him of \$1,500 of the costs incurred before the master, *held* that as it appeared that such complainant had obtained possession of the trust deed which he sought to foreclose by subterfuge, and that a large part of such expense was incurred by reason of the attempt to uphold the pretended sale of such trust deed to the complainant, such objection was untenable.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Prevenas v. Kalodimos Bros. Ice Cream & Candy Co., 205 Ill. App. 490.

Peter Prevenas, Appellee, v. Kalodimos Brothers Ice Cream & Candy Company, Appellant.

Gen. No. 22,030. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed May 9, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Bill by Peter Prevenas, complainant, against Kalodimos Brothers Ice Cream & Candy Company and Peter Kaperonis, defendants, to enjoin the sale, assigning or incumbering of a fruit and candy store sold by defendant Kalodimos Brothers Ice Cream & Candy Company to complainant and taken possession of under a chattel mortgage. From an order overruling a motion to vacate a final decree for complainant, defendant Kalodimos Brothers Ice Cream & Candy Company appeals.

THOMPSON, TYRRELL & CHAMBERS, for appellant.

LOUIS BRANDES, for appellee.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. JUDGMENT, § 277*—*when motion to set aside decree is properly denied.* A motion to set aside a decree, held properly denied as within the discretion of the court where it was based on the affidavit of an officer of defendant corporation that the attorney who had charge of the case died and the files were lost or destroyed and certain legal matters were turned over to its present counsel; that he supposed the interests of defendant were being

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Dougherty v. Becklenberg, 205 Ill. App. 401.

looked after and he did not learn of the decree until about one month thereafter, and defendant's counsel made affidavit that defendant turned over to him several cases; that employees of the former attorney turned over to him all files except those in the case in question; that he did not fully understand the case was on the calendar, and it appeared that a copy of notice to reinstate was served on the defendant; that the transactions involved the purchase of a store and that payments had been made under the contract and possession taken.

2. ACCOUNT, § 40*—*when accounting properly heard by chancellor.* Where an accounting consists of but two items, it may be heard before the chancellor without a reference to a master.

**J. F. Dougherty, Appellee, v. Frederick Becklenberg,
Appellant.**

Gen. No. 21,916. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOSEPH E. RYAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed May 9, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by J. F. Dougherty, plaintiff, against Frederick Becklenberg, defendant, to recover a real estate commission. From a judgment for plaintiff for \$3,125, defendant appeals.

SONNENSCHNEIN, BERKSON & FISHELL and EDWARD H. MORRIS, for appellant.

WILLIAM MCKINLEY, for appellee; A. A. MCKINLEY and LUTHER F. BINKLEY, of counsel.

MR. JUSTICE GOODWIN delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

American Metal Co. v. U. S. Reduction Co., 205 Ill. App. 492.

Abstract of the Decision.

1. **BROKERS, § 88***—*what constitutes prima facie case in action for commissions.* In an action to recover a commission on a certain real estate deal, where defendant agreed to pay plaintiff a certain commission upon consummation of the deal, a *prima facie* case *held* to be made out when plaintiff showed a contract for the sale of the land formally executed by the parties and accepted by the defendant, notwithstanding the defendant later refused to carry out the contract.

2. **CORPORATIONS, § 431***—*when word in signature is descriptio personæ.* The word "treasurer" after the name of an officer of a corporation is *descriptio personæ*.

3. **CORPORATIONS, § 430***—*what is sufficient signature to agreement.* The name of a certain company to a certain agreement, *held* to be sufficient if placed there by a person authorized to act for the company, even though the signature of the person acting as the company's agent did not itself appear.

American Metal Company, Appellee, v. U. S. Reduction Company, Appellant.

Gen. No. 21,925. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. J. J. COOKE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed May 9, 1917. Rehearing denied May 22, 1917.

Statement of the Case.

Action by the American Metal Company, plaintiff, against the U. S. Reduction Company, defendant, to recover for the breach by defendant of a contract for the purchase of 150 tons of antimonial lead. From a judgment for plaintiff for \$807.67, defendant appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

American Metal Co. v. U. S. Reduction Co., 205 Ill. App. 492.

SILBER, ISAACS, SILBER & WOLEY, for appellant.

FELSENTHAL & WILSON, for appellee.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 114*—*when refusal to accept shipments constitutes breach of contract.* Where defendant contracted to purchase of plaintiff certain "Newark antimonial lead, running approximately from 15% to 18% antimony and not above 1% arsenic," and accepted a certain quantity shipped but refused to accept further shipments unless they were found to be absolutely free from copper, and defendant's witnesses testified no antimonial lead is produced "absolutely free of copper," and there was no evidence that the amount of copper supposed to be in the antimonial lead was sufficient to impair its value or render it unsuitable to defendant's purposes, *held* that defendant's refusal to accept shipments unless found to be absolutely free from copper constituted a breach of the contract for which plaintiff would be entitled to recover.

2. SALES, § 65*—*what is effect of provision in contract as to prohibition of given substance in ore.* The expression in a contract of a prohibition against the presence of a given substance in ore sold would, under ordinary canons of construction, exclude any implied exclusion of any other substance.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Conrad v. Charles A. Stevens & Brothers, 205 Ill. App. 494.

Carrie Conrad, Appellee, v. Charles A. Stevens & Brothers, Appellant.

Gen. No. 21,942. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. M. L. MCKINLEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1916. Affirmed. Opinion filed May 9, 1917.

Statement of the Case.

Action by Carrie Conrad, plaintiff, against Charles A. Stevens & Brothers, defendant, to recover damages for personal injuries sustained by plaintiff's fall on a stairway in defendant's building. From a judgment for plaintiff for \$2,500, defendant appeals.

JOHN A. BLOOMINGSTON, for appellant.

RICHARD J. FINN, for appellee.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 683*—*when evidence sufficient to show failure to provide proper handrails on stairway.* Evidence held sufficient to sustain the finding that defendants had failed to provide proper and substantial handrails on the stairway in defendant's building where plaintiff, an employee, sustained injuries, as required by Rev. St. ch. 48, sec. 104 (J. & A. ¶ 5401), providing that proper and substantial handrails shall be provided on all stairways in factories, mercantile establishments, mills or workshops, etc.

2. MASTER AND SERVANT—*what is not proper handrail on stairway.* Where a certain handrailing at the top of a stairway in defendant's building had been cut away on the outside and the end of an upright supporting a series of shelves set into the part cut

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Conrad v. Charles A. Stevens & Brothers, 205 Ill. App. 494.

away for about two feet from the top of the stairway, so that it would be impossible to grasp it, although a hand or a portion of it might rest upon it, *held* that such was not a "proper" handrail within Rev. St. ch. 48, sec. 104 (J. & A. ¶ 5401), providing that proper and substantial handrails shall be provided on all stairways in factories, mercantile establishments, mills or workshops, etc.

3. INSTRUCTIONS, § 67*—*when not erroneous because assuming facts*. It is not erroneous to assume, in an instruction, the existence of an uncontroverted fact fully disclosed by the evidence.

4. APPEAL AND ERROR, § 883*—*necessity of abstracting instruction*. Where complaint was made on appeal of the modification "of another instruction," but the instruction itself was not identified or abstracted, *held* that the court was not constrained to search the record for it.

5. DAMAGES, § 115*—*when judgment not excessive*. A judgment for \$2,500 for personal injuries *held* not excessive.

6. APPEAL AND ERROR, § 1752*—*when judgment affirmed for insufficiency of abstract*. Where appellant's abstract was stricken from the record as not complying with the rules, and he filed a so-called "additional abstract of record" which merely attempted to supplement the former abstract and was altogether incomplete in itself or with the former, *held* that affirmance of the judgment was proper.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hueglin v. Estate of Hesser, 205 Ill. App. 496.

**In the Matter of the Estate of Max M. Hesser,
Deceased.**

**Claim of Charles Hueglin et al., Appellees, v. Estate
of Max M. Hesser, Appellant.**

Gen. No. 21,953. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JOHN P. McGOERRY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed May 9, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Claim by Charles Hueglin and others, claimants, against the estate of Max M. Hesser, deceased, for the manufacture by claimants of a certain wire form for holding clothes lines. From a judgment for claimants for \$1,500, the administratrix of the estate appeals.

ZEISLER, FRIEDMAN & ZEISLER, for appellant.

WALTER H. ECKERT, for appellees.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. **CONTRACTS, § 387***—*when evidence is sufficient to show breach of contract for manufacturing invented article.* Evidence held sufficient to sustain finding that deceased's partner and his executrix refused to perform a contract between the deceased and claimants for the manufacture by claimants of certain forms invented by the deceased, and that the negotiations between the deceased's partner, his executrix and one of the claimants immediately following the deceased's death were for the sole purpose of reducing or avoiding claimants' damages on account of such refusal.

2. **DAMAGES, § 190***—*when evidence is sufficient to sustain verdict.* Evidence held sufficient to sustain a finding of \$1,500 damages for breach of contract.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Jennie Chapman, Appellee, v. Chicago City Railway Company, Appellant.**Gen. No. 21,981. (Not to be reported in full.)**

Appeal from the Superior Court of Cook county; the Hon. M. L. MCKINLEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded. Opinion filed May 9, 1917.

Statement of the Case.

Action by Jennie Chapman, plaintiff, against the Chicago City Railway Company, defendant, to recover damages for personal injuries sustained by plaintiff by being struck by defendant's street car at a street crossing. From a judgment for plaintiff for \$3,500, defendant appeals.

FRANKLIN B. HUSSEY and CHARLES LE ROY BROWN, for appellant; JOHN R. GUILLIAMS, of counsel.

RICHARD J. FINN, for appellee.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. NEGLIGENCE, § 209*—*when instruction on voluntary intoxication as contributory negligence is erroneous.* An instruction that "while evidence of voluntary intoxication is competent to be considered by the jury in determining whether the person was taking that care of his safety which a reasonably prudent man or woman, who was sober, would take under the same circumstances, it does not of itself constitute contributory negligence," held argumentative and misleading, and as attempting to minimize or destroy the effect of legitimate evidence.

2. APPEAL AND ERROR, § 1652*—*when error in instruction not*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Delscamp v. Hahnemann Hospital, 205 Ill. App. 498.

cured by another instruction. Where two instructions, one of which was argumentative, misleading and incomplete, as to the consideration by the jury of evidence as to intoxication of a party, were detached and disconnected, *held* that it could not be assumed that the jury as a matter of fact considered the two together as one instruction so as to cure such improper instruction.

3. APPEAL AND ERROR, § 1316*—*when not assumed that jury decided case on another theory.* Where the instructions offered on behalf of both parties showed the case was submitted to the jury upon a certain theory, *held* that the court could not decide the case upon an hypothesis, resting upon surmise and conjecture, that the jury decided the case upon another theory.

4. INSTRUCTIONS, § 18*—*when fatally erroneous because argumentative and misleading.* Where the testimony as to a party's intoxication was sharply conflicting and the question was of importance, an instruction as to the consideration of such testimony which was argumentative and misleading, *held* to be fatally erroneous.

O'CONNOR, P. J., dissenting.

Margaret M. Delscamp, Appellee, v. Hahnemann Hospital of the City of Chicago, Appellant.

Gen. No. 21,995.

1. STATUTES, § 43*—*what is necessary as to classification of enterprises.* When the Legislature attempts to subject enterprises to a new sort of liability not known to the common law, and without any affirmative election on the part of the proprietors of such enterprises, the classification should be so clear that all such proprietors will know at once whether they were or were not included.

2. WORKMEN'S COMPENSATION ACT, § 1*—*how construed.* Legislation, like the Workmen's Compensation Act, designed to promote the general welfare of the State, should not be so construed, on the one hand, as to defeat its object and on the other, as to make it a net for the unwary.

3. WORKMEN'S COMPENSATION ACT, § 1*—*when business is not extrahazardous.* Where defendant's business was that of maintaining a hospital in a structure containing elevators, high pressure

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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boilers, electric wiring and apparatus for generating and conducting electricity and stairways, subject, together with the building, to the regulatory ordinances of a large city, *held* that such business was not extrahazardous within the meaning of clause 8, paragraph (b) of section 3 of the Workmen's Compensation Act of 1913 [Cal. Ill. St. Supp. 1916, ¶ 5475(3)], declaring occupations, enterprises or businesses to be extrahazardous in which statutory or municipal ordinance regulations may be imposed for the regulating, guarding, use or placing of machinery or appliances, or for the protection or safeguarding of employees or the public therein.

O'CONNOR, P. J., dissenting.

Appeal from the Circuit Court of Cook county; the Hon. WILLIAM M. VANDEVENTER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed. Opinion filed May 9, 1917.

ASHCRAFT & ASHCRAFT, for appellant; CHARLES F. RATHBUN, of counsel.

M. D. DOLAN, for appellee.

MR. JUSTICE GOODWIN delivered the opinion of the court.

This is an appeal from a judgment of the Circuit Court quashing and dismissing a writ of certiorari to review a proceeding of the Industrial Board which awarded to appellee \$3,500 on a claim brought under the Workmen's Compensation Act of 1913, on account of the death of her husband while in the employ of the appellant.

The record discloses that the deceased was employed by appellant as chief engineer of its hospital, and as such it was his duty to superintend the upkeep and repair of the machinery, heating, ventilation and lighting systems; that he met his death as the result of a fall while coming down the rear stairway from the third floor.

The appellee contends that as the structure used by

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the appellant contained elevators, high-pressure boilers, electric wiring and apparatus for generating and conducting electricity, and stairways, subject to the regulatory ordinances of the City of Chicago, and as the building itself was subject to the same ordinances, the business or enterprise of appellant came within clause 8, paragraph "b" of section 3 of the Workmen's Compensation Act of 1913 [Cal. Ill. St. Supp. 1916, ¶ 5475(3)], and that, therefore, appellant was subject to the terms of the act, although it had not given notice of its election to be bound by it. The section in question is as follows:

"3. (a) In any action to recover damages against an employer, engaged in any of the occupations, enterprises or businesses enumerated in paragraph (b) of this section, who shall elect not to provide and pay compensation to any employee, according to the provisions of this act, it shall not be a defense, that: First, the employee assumed the risks of the employment; second, the injury or death was caused in whole or in part by the negligence of a fellow-servant; or third, the injury or death was proximately caused by the contributory negligence of the employee.

"(b) The provisions of paragraph (a) of this section shall only apply to an employer engaged in any of the following occupations, enterprises or businesses, namely:

"1. The building, maintaining, repairing or demolishing of any structure;

"2. Construction, excavating or electrical work;

"3. Carriage by land or water and loading or unloading in connection therewith;

"4. The operation of any warehouse or general or terminal store houses;

"5. Mining, surface mining or quarrying;

"6. Any enterprise in which explosive materials are manufactured, handled or used in dangerous quantities;

"7. In any enterprise wherein molten metal, or explosive or injurious gases or vapors, or inflammable

vapors or fluids, or corrosive acids, are manufactured, used, generated, stored or conveyed in dangerous quantities;

"8. In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances, or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extrahazardous."

The question before the court in this case, therefore, is as to whether appellant was an employer engaged in any of the "occupations, enterprises or businesses" enumerated in paragraph (b) above quoted. Clearly appellant's sole business was that of maintaining a hospital; in no way can such an enterprise be said to be extrahazardous as that term has been construed in the case of *Uphoff v. Industrial Board of Illinois*, 271 Ill. 312 [13 N. C. C. A. 80], where the court said, at page 317:

"It is also plain that the Legislature only intended to include under paragraph (b) any such occupations, enterprises or businesses of the employer when they were properly considered to be 'extrahazardous.' It is true that the clause in subdivision 8 of said paragraph (b) calling all of these trades, businesses, enterprises or occupations extrahazardous was inserted for the purpose of making clear what was considered extrahazardous, but it is also clear that the Legislature did not intend to include work that everyone knows is not extrahazardous or even hazardous."

Nor does appellant seem to be engaged in an extrahazardous enterprise merely because it occupies a building suitably large for its needs, and equipped with the apparently usual and customary freight and passenger elevators, system of high-pressure boilers, wiring and electrical apparatus for generating and conducting electricity, and a steam-heating system, although these appliances are, like many others in com-

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mon, every-day use, subject to municipal regulations. When the Legislature attempts to subject enterprises to a new sort of liability not known to the common law, and without any affirmative election on the part of the employer, it would seem that the classification should be so clear that all employers would know at once whether they were or were not included. It logically follows from this that if the act does not, by its terms, clearly include an enterprise, then the Legislature, according to the ordinary canons of construction, cannot be presumed to have intended that the enterprise should fall within its terms. Any other construction would lead to doubt and uncertainty. While legislation of this kind, designed to promote the general welfare of the State, ought not to be so construed as to defeat its object, yet, on the other hand, it should not be so construed as to make it a net for the unwary.

As we are, therefore, of the opinion that appellant's business was not extrahazardous within the meaning of the term as defined by our Supreme Court, and is not included within the language of section 3, the judgments of the Circuit Court and the Industrial Board are reversed.

Reversed.

MR. PRESIDING JUSTICE O'CONNOR dissenting:

This proceeding involves a claim for compensation for the death of appellee's husband under the Workmen's Compensation Act of 1913. The proceedings before the Industrial Board resulted in the allowance of compensation to appellee aggregating \$3,500, payable in instalments. The evidence disclosed that appellant is a corporation organized not for pecuniary profit, and conducts and operates a hospital in Chicago. Appellee's husband, William H. Delscamp, was employed by appellant as chief engineer. His duties

were to superintend the operation and repair of the heating, lighting, ventilation and plumbing systems of the hospital. About four o'clock p. m., December 16, 1915, he was found lying in an injured and unconscious condition at the foot of the basement stairs in the rear of the hospital. Upon examination it was found that he sustained a fracture of the skull and other injuries, from which he died a few days later.

Appellant contends that it is not subject to the provisions of the Workmen's Compensation Act, in that the business or occupation which it conducted was not extrahazardous within the meaning of the act, and as it had not given the notice of its election to accept the terms of the act, as provided by section 1, paragraph (a), the Industrial Board was therefore without jurisdiction.

It is conceded that appellant did not give the notice of its election to accept the terms of the act, as provided. The question then is whether the hospital as conducted by appellant was an extrahazardous business as defined in the act. Section 3, paragraph (b) of the Act [Cal. Ill. St. Supp. 1916, ¶ 5475(3)] enumerates certain occupations, enterprises or businesses which are deemed extrahazardous. Paragraph (b), so far as material, is as follows:

"8. In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances, or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extrahazardous."

In construing subdivision 8 of paragraph (b), the Supreme Court, in the case of *Uphoff v. Industrial Board of Illinois*, 271 Ill. 312 [13 N. C. C. A. 80], said p. 317:

"It is also plain that the Legislature only intended to include under paragraph (b) any such occupations,

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enterprises or businesses of the employer when they were properly considered to be 'extrahazardous.' It is true that the clause in subdivision 8 of said paragraph (b) calling all of these trades, businesses, enterprises or occupations extrahazardous was inserted for the purpose of making clear what was considered extrahazardous, but it is also clear that the Legislature did not intend to include work that everyone knows is not extrahazardous or even hazardous."

The evidence tends to show that appellant conducts a hospital in the City of Chicago in a seven-story building, which is equipped with freight and passenger elevators; a system of high-pressure boilers in the basement; a system of wiring and electrical apparatus, used for generating and conducting electricity, and a steam-heating system; all of which, as to installation and operation, are regulated and controlled by ordinances of the City of Chicago, "for the protection and safeguarding of the employees or the public." The evidence further tends to show that it is the duty of the deceased to supervise the operation of all these appliances, and that in the performance of his duties he was required to use the freight and passenger elevators from time to time in going to and from the several floors of the hospital; that he had a desk in the basement near the boilers where he could be found when not called by his duties to some other portion of the building. His hours of work were from eight o'clock in the morning until six or seven o'clock in the evening. Sometimes he worked all night, and he was expected to call on Sundays at the hospital. He had worked at the hospital for more than seventeen years. The witness Burt, who was the general superintendent of the hospital for twenty years, testified that on an occasion when he saw the deceased under the influence of liquor, he told him he must stop drinking; that "I would not feel the confidence to let him take charge of a high pressure plant because there

might be something happen to a lot of sick people; we could not take a chance."

Section 4 of the Act [Cal. Ill. St. Supp. 1916, ¶ 5475(4)] defines the term "employer" to be "every person, firm, public or private corporation, including hospitals, public service, eleemosynary, religious or charitable corporations or associations," who have come under the act by notice or otherwise. From this it appears that a hospital, if its business is extrahazardous within the meaning of section 3, paragraph (b) would under section 2 [Cal. Ill. St. Supp. 1916, ¶ 5475(2)], come within the act without notice. From a careful consideration of this paragraph, and the manner in which the hospital was constructed and operated, I am clearly of the opinion that appellant is subject to the provisions of the act, and that, if the deceased received accidental injuries "arising out of and in the course of the employment," then under the rule announced in the cases of *Suburban Ice Co. v. Industrial Board of Illinois*, 274 Ill. 630; *Vaughan's Seed Store v. Simonini*, 275 Ill. 477; *Marshall v. City of Pekin*, 276 Ill. 187, appellee was entitled to recover.

Appellant, however, contends that there was no evidence that the injuries received were accidental, or that they arose out of and in the course of his employment. In support of this contention it is argued that no one saw how the injuries were received, and that the evidence clearly shows that the deceased, at and prior to the time he was injured, was intoxicated, and was not in the discharge of his duties, but was injured as a result of such intoxication.

The evidence tends to show that the deceased had been in the employ of appellant for more than seventeen years; that his duties took him from time to time to all parts of the building; that his desk was in the boiler room in the basement; that the usual method of reaching his desk was by means of the stairway, at

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the foot of which he was found unconscious; that it was necessary for him in the discharge of his duties to go up and down this stairway several times daily; that about fifteen minutes before he was found he went up the stairs from the boiler room to fix some radiators; that a little later he was seen going down the stairs in the direction of his desk; that the stairway was dark, and immediately thereafter he was found unconscious at the foot of the stairs. There was evidence, however, which tended to show that the deceased had been drinking during the day and was intoxicated; that he was so under the influence of liquor that he could scarcely navigate; that he was seen to stagger towards the stairway. On the other hand, there was evidence tending to show that he was not under the influence of liquor, although he had been drinking some during the day; that he had been on duty all day and was on duty at the time he received the injuries. I think there is evidence to sustain the finding of the Industrial Board that he received accidental injuries arising out of and in the course of his employment, and, in the absence of fraud, both the Circuit Court and this court are bound by such finding. *Munn v. Industrial Board of Illinois*, 274 Ill. 70 [12 N. C. C. A. 652].

Mary T. Case and Frances Pirase, Conservatrix, Appellees, v. John E. Case, Appellant.

Gen. No. 21,998. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. J. H. FORNORF, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed May 9, 1917.

Statement of the Case.

Bill by Mary T. Case, an insane person, and Frances Pirase, her conservatrix, complainants, against John E. Case, defendant, for divorce. From an order increasing complainants' allowance of temporary alimony from \$30 to \$50 a month, defendant appeals.

DEHAVAN B. COLE, for appellant.

HENRY R. BALDWIN, for appellees.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

DIVORCE, § 110*—*when increase in alimony is not erroneous.* Increase of alimony from \$30 to \$50 a month, held not erroneous, where the latter amount had been paid from 1906 to 1914, and defendant was receiving \$45 a week salary, and complainant was an insane person.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**John G. O'Neil, Plaintiff in Error, v. City of Chicago,
Defendant in Error.**

Gen. No. 21,695. (Not to be reported in full.)

Error to the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded. Opinion filed May 9, 1917. Rehearing denied May 24, 1917.

Statement of the Case.

Action by John G. O'Neil, plaintiff, against the City of Chicago, defendant, to recover for alleged wrongful exclusion by defendant of plaintiff from performance by plaintiff of a certain contract entered into between plaintiff and defendant upon the acceptance by defendant of plaintiff's bid upon certain work to be performed at Lake View Pumping Station of defendant. From a judgment for defendant, plaintiff brings error.

Plaintiff was the highest of three bidders on the work in question when the bids were first submitted. Shortly after acceptance of his bid and making of the contract referred to, one of the other bidders instituted suit alleging the contract was illegal and void, as not complying with the statutes requiring competitive bidding, and asking injunction against this plaintiff and defendant. A temporary injunction was issued and later the presiding judge gave an oral opinion directing the entry of a final decree granting a perpetual injunction. Before entry of such decree this judge died. Thereafter the city readvertised the work and again entered into a contract with plaintiff to do substantially the same work. Such contract was carried out and the work completed by him. Said suit was dismissed by stipulation of the parties.

JOHN S. HUMMER, COBURN & BENTLEY and JAMES E. McGRATH, for plaintiff in error.

SAMUEL A. ETTTELSON, for defendant in error; MOR-
TON S. CRESSY, WILLIAM C. RIGBY and RUBENS, FISCHER,
MOSSER & BARNUM, of counsel.

MR. JUSTICE TAYLOR delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL CORPORATIONS, § 387*—*what is duty of city commissioner as to letting contracts for public work.* Under sections 1611, 1612 and 1626 of the Revised Code of Chicago, 1897, vol. 1, relating to the letting of contracts for public work, the clear intention held to be that such contracts shall be let so that nothing is left for the commissioner but to decide who is the lowest responsible bidder for such work, as among bidders equally responsible the work cannot lawfully be awarded to one who is not the lowest bidder.

2. MUNICIPAL CORPORATIONS, § 408*—*when plea by city in action for exclusion from performance of contract is erroneous.* In an action against a city to recover for refusal by defendant to allow plaintiff to perform a contract for certain public work entered into between plaintiff as the accepted bidder for such work and defendant, where defendant's plea failed to aver that either of the refused bidders was a reliable and responsible bidder and simply averred that plaintiff was not the lowest reliable and responsible bidder, which was expressly traversed by plaintiff in his replication, held that such plea was bad and demurrer to such replication was erroneously sustained.

3. MUNICIPAL CORPORATIONS, § 408*—*when sufficiency of plan and specifications is question of fact.* The sufficiency of a certain plan and specifications to comply with certain city ordinances set up in defendant's plea requiring that plans and specifications for public works to be constructed on file with the commissioner of public works shall give full and definite information of the precise work to be done, held to be a question of fact which could not be passed upon on review in the absence of further evidence, in an action against a city to recover for defendant's refusal to allow plaintiff to perform a contract for certain public work entered into between plaintiff and defendant.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

O'Neill v. City of Chicago, 205 Ill. App. 508.

4. PLEADING, § 203*—*when demurrer to replication carried back and sustained as demurrer to plea.* In an action against a city to recover for defendant's refusal to allow plaintiff to perform a contract entered into between plaintiff as the accepted bidder for certain public work and defendant, where defendant filed plea setting up certain city ordinances requiring that contracts for public works be awarded to the lowest reliable and responsible bidder and setting up also certain provisions of the specifications for the work that bidders should submit drawings and descriptions as to certain parts of the work, and alleging that such drawings and descriptions were so varied that it was impossible for the commissioner of public works to arrive at a conclusion as to which was the lowest responsible bidder, to which plaintiff filed replication alleging such drawings and descriptions were only working plans required for the purpose of furnishing information as to the bidders' skill and ability, *held* that a demurrer to such replication should be carried back and sustained as a demurrer to the plea.

5. ESTOPPEL, § 16*—*when by suit does not arise.* Where an oral opinion, only, was rendered and no decree was entered in a suit, *held* that there was no estoppel upon a party to such suit by reason of the suit.

6. ESTOPPEL, § 16*—*when by reason of suit arises.* There can be no estoppel by reason of a suit until a final decree is entered therein.

7. ESTOPPEL, § 97*—*when replication negatives all elements of estoppel by suit.* Where defendant's plea set up plaintiff's acquiescence in a certain oral opinion rendered in another suit to which both plaintiff and defendant were parties by the judge presiding therein, that plaintiff made no claim under the contract sued on but made a new contract with defendant for the same work which he performed and was paid for, and that plaintiff signed a stipulation for dismissal of that suit, to which plea plaintiff filed replication traversing each material averment thereof and set up other facts, *held* that the replication did not fail to negative all of the elements of estoppel, in an action to recover for defendant's refusal to allow plaintiff to perform the first contract.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Dennis K. Lindhout and J. C. K. Lindhout, copartners,
trading as Lindhout & Lindhout, Appellants, v.
City of Chicago Heights, Appellee.**

Gen. No. 21,791.

1. MUNICIPAL CORPORATIONS—*when resolution for employment of attorney ratified at subsequent meetings of council is binding.* A resolution of the city council of defendant, a municipal corporation, passed by the affirmative vote of eleven out of fourteen members thereof at an alleged illegal special meeting of the council, the minutes of which, together with such resolution, were presented to and approved by a subsequent regular meeting of the council at which were present the mayor and a majority of the members of the council, and the minutes of which regular meeting were approved by a subsequent regular meeting at which were present the mayor and all but one of the members of the council, *held* sufficient to bind the defendant to the employment of the plaintiffs as defendant's attorneys as provided in such resolution, and to justify the rendition of legal services by plaintiffs and entitle them to fair and reasonable compensation for such services when rendered.

2. MUNICIPAL CORPORATIONS, § 118*—*when city is liable for services of attorneys.* Where plaintiffs rendered legal services pursuant to request and promise of defendant, a municipal corporation, and defendant accepted and benefited by such services, which were rendered in good faith by plaintiffs, *held* that defendant could not avoid the obligation to pay for such services.

3. MUNICIPAL CORPORATIONS, § 45*—*when city council may employ counsel.* Where a proceeding in quo warranto was brought against the members of a board of local improvement created by an ordinance of defendant, a municipal corporation, which was claimed in such proceeding to be invalid, *held* that the city council of defendant had authority to retain legal counsel to defend it or any of its members against such proceeding.

4. MUNICIPAL CORPORATIONS, § 118*—*what constitutes ratification and allowance of claim for attorneys' fees.* Where the judiciary committee of the city council of defendant, a municipal corporation, recommended that a certain suit by plaintiffs against defendant be settled for a certain sum and that a judgment be entered for such sum against defendant in plaintiffs' favor, and the city council of defendant subsequently passed a resolution empowering and

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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directing the judiciary committee to have such judgment entered, *held* that such resolutions recognized defendant's liability in such suit and constituted a ratification and allowance of plaintiffs' claim therein.

5. MUNICIPAL CORPORATIONS, § 126*—*what evidence on behalf of plaintiff is improperly rejected where set-off interposed in action for attorneys' fees.* Evidence offered tending to show that certain amounts paid by defendant, a municipal corporation, to one of the plaintiffs, and claimed as a set-off in an action by plaintiffs to recover for legal services rendered to defendant, were paid pursuant to certain resolutions passed by the board of local improvements and the city council of defendant, and were paid by such plaintiff to certain stenographers and clerks which he, for the defendant, hired to perform certain work on city assessments, and that such plaintiff paid out to such persons for such work a certain amount in excess of the amount of such set-off allowed, *held* improperly rejected.

Appeal from the City Court of Chicago Heights; the Hon. CHARLES H. BOWLES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded. Opinion filed May 9, 1917.

LINDHOUT & LINDHOUT, *pro se* and FRANCIS X. BUSCH, for appellants.

CRAIG A. HOOD and EARL E. SMITH, for appellee.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a suit against the City of Chicago Heights, for attorney's fees, for legal services rendered to the City of Chicago Heights by the appellants (hereinafter called plaintiffs). The claim for compensation for such services was based upon certain resolutions passed by the City Council of the City of Chicago Heights, and certain contracts entered into between the Judiciary Committee of the City Council of the City of Chicago Heights and the plaintiffs.

At the close of all the evidence, the trial judge, on

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

motion of the defendant, struck out all the evidence theretofore offered and received in support of the plaintiffs' claim, and entered judgment in favor of the defendant, on a plea of set-off, in the sum of \$895.06.

On May 13, 1912, the city council of the defendant city, passed a resolution engaging "the services of said J. C. K. Lindhout to represent the City of Chicago Heights in all legal matters, and to continue to advise with this council at a remuneration to be determined later."

It is contended by the defendant city that the meeting of the city council on May 13, 1912, at which the resolution of employment was passed, was illegal. The call for the special meeting of May 13, 1912, was at the request of three aldermen of the defendant city, who gave notice that at the meeting there would be taken up and considered (1) resolutions concerning the office of city engineer, and (2) other resolutions and ordinances. The minutes of the meeting that was held on May 13, 1912, recite that the mayor "declared that the meeting was not legal, owing to the fact that the call was not specific enough, and therefore stated that the city council meeting was not in session"; that a motion was then carried to take a recess for thirty minutes; that after a thirty-minute recess the meeting was again called to order; that the mayor stated that he considered the special council meeting adjourned; that one of the aldermen then moved that Alderman Johnston act as chairman of the meeting, which motion was carried; that thirteen of the aldermen of defendant city, out of fourteen (one being ill), were present at the meeting; that at that meeting the resolution was passed employing Lindhout.

On May 20, 1912, at a regular meeting of the city council of the defendant, at which were present the mayor and a majority of the aldermen, the minutes of

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the special meeting of May 13, 1912, which included the resolution of employment, with the exception of an immaterial amendment, were approved. Also at a regular meeting of the city council of the defendant, held on June 3, 1912, at which were present the mayor and all of the aldermen but one (who was absent on account of illness), the minutes of the meeting of May 20, 1912, were approved.

In the case of *City of Shawneetown v. Baker*, 85 Ill. 563, the court says: "Without examining that question, we think it is sufficient that, at the regular meeting of the council subsequently held, the minutes of the special meeting were read and approved, which is equivalent to a ratification of what was done at that meeting."

We are of the opinion that the resolution of the city council of the defendant, passed on May 13, 1912, engaging the services of J. C. K. Lindhout in all legal matters, etc., which was approved by the affirmative vote of eleven out of the fourteen aldermen, and which resolution and the minutes of that meeting were presented to the regular meeting of the city council of the defendant on May 20, 1912, at which were present the mayor and ten aldermen, and were approved, and which resolution was again presented to the regular meeting of the city council of the defendant, held on June 3, 1912, at which were present the mayor and all of the aldermen but one (who was ill), and approved, was sufficient to bind the defendant and to justify the rendition of legal services by the plaintiffs and entitle them, when such services were rendered, to fair and reasonable compensation therefor. *Village of Harvey v. Wilson*, 78 Ill. App. 544.

Prior to May 20, 1912, a controversy having arisen in regard to certain street improvements, as to whether they should be of asphalt or brick, or other material, and the board of local improvements then

consisting of the mayor, the city engineer and the street commissioner, the aldermen of the defendant city undertook to change the ordinances so as to provide for a board of local improvements differently constituted. Accordingly on May 20, 1912, the city council passed, over the veto of the mayor, an ordinance providing for a board of local improvements, consisting of the mayor, the superintendent of streets, and one alderman from each of the seven wards composing the city. Subsequently, in September, 1912, quo warranto proceedings were instituted, which challenged the ordinance creating the new board, and which undertook to oust the members of the new board.

On September 30, 1912, at a special meeting, the city council authorized and instructed the judiciary committee "to employ counsel for the defense in the quo warranto proceedings, and that Horace S. Oakley, of Chicago, be engaged as consulting attorney to said counsel," and on October 7, 1912, at a regular meeting, the city council of defendant adopted the recommendation of the judiciary committee, which was to the effect "that it engage the services of the law firm of Lindhout & Lindhout (the plaintiffs) and H. S. Oakley, of the law firm of Wood & Oakley, to defend the interests of the City of Chicago Heights in the suit, and to defend the Aldermen and the Board of Local Improvements of the City of Chicago Heights, in the suit of quo warranto proceedings brought against them," and recommended "that said counsel be paid the usual and customary reasonable attorney fees in such kind of cases, and that the court and litigation expense fund and the fund to pay the legitimate expenses of the city for corporate purposes and not otherwise appropriated for or so much thereof as may be necessary be appropriated to pay for said legal services."

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In regard to legal services, the evidence shows that the plaintiffs rendered approximately a total of one hundred and sixty-three days of service in defending the city and aldermen against the quo warranto proceedings, and in supporting the legality of the ordinance.

It is contended, however, by the defendant city, that the proceedings of the city council of September 30, 1912, and of October 7, 1912, were illegal; also that the legal services rendered did not benefit the defendant, and that the defendant was not interested, either directly or indirectly, in the outcome of the action, and is therefore not liable.

The position of the defendant, however, is entirely untenable. The law will not permit the defendant city to avoid its legitimate obligations. The plaintiffs rendered their services, pursuant to the request and promise of the defendant city, and the defendant accepted and benefited by the plaintiffs' services, which were rendered in good faith, and there is now no way to avoid liability.

The quo warranto proceedings which were brought against the members of the new board of local improvements were brought against them not because of any lack of personal qualifications, or for any reason that pertained to the members personally and not officially, but because it was claimed and alleged that the ordinance which created those positions was invalid. That the city council of the defendant had authority to retain the plaintiffs to defend it, or any of its members, against a proceeding which undertook to impugn the validity of the ordinance creating the board of local improvements, cannot be considered a matter of doubt.

As to legal services which were rendered by the plaintiffs exclusive of those in the quo warranto proceedings: There was presented to the city council of the defendant, on October 7, 1912, and adopted, a reso-

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lution which recites that the judiciary committee, to which was referred the settlement of the suit of the plaintiffs against the City of Chicago Heights, "believe that the special committee which determined that \$7,500 was a reasonable settlement of the above claim did so after careful investigation, and upon honest and sufficient belief and data," and the judiciary committee accordingly recommended that the suit be settled for \$5,000 and that a judgment be entered against the defendant for that sum, in favor of the plaintiffs. The resolution also gave authority and direction to the city clerk as to the payment of said sum, which resolution was carried by a vote of seven to five.

On October 21, 1912, at a regular meeting of the city council of the defendant, another resolution was presented and passed, to the effect that the "judiciary committee be fully empowered and directed to have judgment entered against the city according to the accepted recommendation of said committee, in Lindhout Brothers' suit, and to engage legal counsel therefor, if necessary, to represent the city and to carry out these directions."

We are of the opinion that the foregoing resolutions constituted a ratification and allowance of the plaintiffs' claim. That account, which was for legal services outside of those in the quo warranto proceedings, was a debt for which the city was liable, and by the foregoing resolutions it recognized its liability.

The judgment of set-off in the sum of \$895.06, which was entered against the plaintiffs, seems to be based upon eight vouchers which were paid to J. C. K. Lindhout, one of the plaintiffs, while he was corporation counsel for the defendant city, at a salary fixed by ordinance. The trial court seems to have acted on the theory that J. C. K. Lindhout had illegally received that amount and that therefore it could be recovered back upon a set-off in an action brought against the city.

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The plaintiffs, in defense thereof, offered certain resolutions of the city council of the defendant and of the board of local improvements in an endeavor to show that the amounts so paid were not additional compensation for services, but were in repayment of stenographic and clerical expense in connection with the spreading of the special assessments to which the vouchers related.

We are of the opinion that the evidence offered by the plaintiffs, which tended to prove that the amounts of money claimed by the defendant by way of set-off, were paid to J. C. K. Lindhout, pursuant to certain resolutions of the board of local improvements and the city council, and which tended to show that J. C. K. Lindhout, for the defendant city, hired stenographers and clerks who did the work on certain assessments; that they were hired for the City of Chicago Heights; that he paid out to those stenographers and clerks over \$1,000 in excess of the amount of the defendant's set-off, and that none of the money went into his own pocket, but went to pay stenographers and clerks for the defendant city, who did clerical work connected with the spreading of the special assessments, was improperly rejected and should have been received in evidence.

For manifest error in striking out the evidence of the plaintiffs' claim and refusing to admit evidence offered by the plaintiffs in defense of the set-off, the judgment is reversed and the cause remanded.

Reversed and remanded.

William F. Flowers, George Finnegan and Fred C. Caliger, Appellees, v. Grand Lodge of the Brotherhood of Railroad Trainmen, William G. Lee, President, et al., Appellants.

Gen. No. 21,877.

1. INSURANCE, § 719*—*when courts have no jurisdiction over question of removal of member of association.* In a suit against the grand lodge of a fraternal beneficial association to enjoin it and its officers and agents from revoking, suspending or canceling the charter of a subordinate lodge or interfering with the membership or office of any member of the subordinate lodge because of any action by it or its members in connection with certain charges made against and trial of one of such members who had been removed by the president of such association from a certain office held by such member, *held* that the court would have no jurisdiction in such suit over the question of the removal of such member or the controversy between him and the president.

2. INSURANCE, § 725*—*when court of equity will take cognizance of action of threatened revocation of charter of subordinate lodge.* Where the president of a fraternal beneficial association threatened to revoke the charter of a subordinate lodge of such association which act, if performed, would so imperil the right of the several members of such lodge in the insurance funds of the association that such right might easily be lost, or, from a practical standpoint, be rendered valueless, and would give rise to damages which could not accurately be measured without complicated accounting and a multiplicity of suits, *held* that a court of equity might properly take cognizance of the matter, notwithstanding the remedies within such association had not been exhausted, where the only remedies provided within the association were mere privileges and not enforceable rights of the members.

3. INSURANCE, § 725*—*when injunction against revocation of charter of subordinate lodge is properly granted.* Where a member of a subordinate lodge of a fraternal beneficial association was tried by such lodge upon a certain charge and acquitted, and the lodge refused to recall its action and find such member guilty when requested so to do by the president of the association, to whom the constitution of the association gave no such power or authority, *held* that a writ of injunction against the president and the grand lodge of the association restraining him and it from revoking the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Flowers et al. v. Grand Lodge of the B. of R. T., 205 Ill. App. 519.

charter of such subordinate lodge because of such refusal by it, as threatened by him, was properly issued and made permanent.

4. INSURANCE, § 723*—*when members entitled to equitable relief against acts of association.* Where a fraternal beneficial association undertakes to violate its constitution and rules and by doing so injuriously affects the substantive insurance or property rights of its members, they are entitled to seek relief in a court of equity.

5. INSURANCE, § 725*—*when bill to restrain revocation of charter of subordinate lodge not prematurely filed.* A bill for injunction to restrain the grand lodge of a fraternal beneficial association, its officers and agents, from revoking the charter of a subordinate lodge of the association or interfering with the membership or office of any member of such subordinate lodge, filed without first appealing to such grand lodge under the laws of the association, held not filed prematurely where such grand lodge meets only once in three years, and in the meantime insurance claims might mature and remain unpaid and the beneficiaries suffer should such revocation be made.

Appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed May 9, 1917.

CHARLES C. STILWELL, for appellants; E. JAY PINNEY, of counsel.

QUIN O'BRIEN, for appellees.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court, perpetually restraining the Grand Lodge of the Brotherhood of Railroad Trainmen, its officers and agents (defendants), from taking any action in the way of "revoking, suspending or cancelling" the charter of Square Deal Lodge No. 752, and from expelling, or attempting to expel from membership, and in any manner interfering with the membership or office of any member of said lodge, for any action of said lodge, or its members, in connection with certain charges made against, and the trial of one William J. Pinkerton, a member of said subordinate lodge.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

On October 28, 1912, W. G. Lee, the president of the Brotherhood, notified Pinkerton, who was the legislative representative of Square Deal Lodge No. 752, that on account of his disobedience of the rules of the Brotherhood, under the terms of section 154 of the constitution, in that he had circulated among lodges and members of the Brotherhood, communications pertaining to the then pending Federal Workmen's Compensation Law, which reflected improperly upon the conduct of President Lee and the president of the American Federation of Labor, and others, that he was removed. At the same time Square Deal Lodge No. 752 was also notified. On November 11, 1912, the subordinate lodge notified President Lee that they would contest the removal of Pinkerton, and recognize him until the action of the president could be overruled. Subsequently, on November 19th, President Lee notified the subordinate lodge that it was in his power to declare the lodge defunct if it failed to elect a successor to legislative representative, Pinkerton. On December 20, 1912, President Lee notified the lodge to proceed to try Pinkerton, on account of his alleged violation of article 154 of the constitution. Pursuant thereto; and in accordance with President Lee's order, charges were preferred and a trial had, and upon the report of the Trial Committee, which unanimously acquitted Pinkerton, being presented to the subordinate lodge, it was on February 9, 1913, approved by a vote of forty to one.

On February 7, 1913, President Lee wrote to the vice president, A. F. Whitney, who had been delegated to represent the defendants in prosecuting the Pinkerton case, as follows:

"It is my understanding that you will attend the next meeting of Lodge No. 752, at which the Trial Committee's report will be presented, and if Pinkerton should be exonerated, as he probably will, because

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I am of the opinion the Trial Committee was discriminately selected, I wish you to see to it that some brother appeals to this office immediately, as provided in the Constitution. It is not my intention to permit Pinkerton to escape punishment for the flagrant violation of the Constitution referred to in the charges, and in all probability it will be necessary to close Lodge No. 752, which I will have no hesitancy in doing unless they enforce the law."

On February 17, 1913, President Lee wrote to the officers and members of Square Deal Lodge No. 752, that unless the latter on Sunday, February 23, 1913, rescind the action taken at its meeting held February 9, 1913, in refusing to find Pinkerton guilty, "and does find brother Pinkerton guilty of said charges, and declares him expelled from the Brotherhood of Railroad Trainmen, the undersigned, as President of the Grand Lodge, will at once proceed to cite the lodge to show cause why its charter should not be revoked for failure to do so."

At the next meeting of the subordinate lodge, held on February 23, 1913, the lodge instructed the secretary to advise President Lee that it could not abide by his order to rescind the action of February 9, 1913; that it refused to act on the ground that it was contrary to section 145 of the constitution.

On February 24, 1913, President Lee wrote to the officers of the Square Deal Lodge No. 752, giving them notice to show cause on or before Friday, February 28, 1913, why the charter of the lodge should not be suspended or revoked, as provided for in section 42 of the constitution of the Grand Lodge.

On February 26, 1913, the bill of complaint in this cause was filed by William F. Flowers, George Finnegan and Fred C. Caliger, on behalf of themselves and all of the members of Square Deal Lodge No. 752, having been duly appointed a committee for such purpose

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by the unanimous vote of Square Deal Lodge No. 752, at a meeting held February 23, 1913.

The bill of complaint was answered, a replication filed, and the cause referred to a master, who on October 23, 1914, reported that inasmuch as a large proportion of the members of Square Deal Lodge participate in the insurance features of the Brotherhood, and as President Lee stated as a witness that if the injunction had not been issued against him he would have forfeited the charter of Square Deal Lodge, the latter was entitled to an injunction restraining the forfeiture of the charter of Square Deal Lodge, to prevent the members of Square Deal Lodge from being deprived of certain insurance rights. All of the exceptions of the defendants to the master's report were overruled, and the report approved and confirmed, and subsequently a decree was entered making permanent and perpetual the injunction theretofore granted in this cause. The decree perpetually enjoins the Grand Lodge and its officers from interfering with the membership or office of any member of Square Deal Lodge No. 752, by reason of anything pertaining to or growing out of the charges made against and the trial of Pinkerton.

The evidence shows that the Brotherhood of Railroad Trainmen is a labor organization and conducts a fraternal insurance business, paying death and disability amounts, in accordance with its constitution and general rules.

The justice or injustice of the removal of Pinkerton as legislative representative is not a matter which the court, in this cause, may investigate, or of which it may take jurisdiction. The court here cannot adjudicate concerning the controversy between President Lee, on the one hand, and Pinkerton on the other, over the Brantley Workingmen's Compensation Act. *Brotherhood of Railway Trainmen v. Greaser*, 108 Ill. App. 598.

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The critical question here is whether the threatened revocation of the charter of Square Deal Lodge No. 752 imperils the property rights of the members of that subordinate lodge.

It is contended by appellant that the court may not take jurisdiction until the appellees have sufficiently exhausted their remedies within the Brotherhood.

The claim of the appellees is that the injunction of the court is necessary to protect their insurance rights; that without the injunction the appellants will destroy the insurance rights of the individual members of the subordinate lodge. The 184 members of the subordinate lodge hold beneficiary certificates (aggregating \$250,000) entitling each of them, or their beneficiaries, to various sums of money ranging from \$500 to \$1,500 in the event of the disability or death of the member insured. Insurance assessments which have been paid in by the complainants and other members of the Brotherhood of Railroad Trainmen have accumulated so that there is now in the treasury of the Grand Lodge a guarantee fund of over two million dollars. Each of the members of the subordinate lodge who has kept up his insurance has a substantive property right in that fund. If the charter of the subordinate lodge is revoked, as threatened and it is admitted by President Lee in his testimony that he would have revoked it had it not been for the injunction, then the right of each of the members of the subordinate lodge in the general fund is not only threatened, but so imperiled that it may easily become lost, or, from a practical standpoint, valueless. Appellees have asked that the appellants be enjoined from revoking the charter and from expelling or suspending any member of the subordinate lodge, by reason of anything connected with the Pinkerton matter.

Appellant, in its brief, states "that the only insurance is in the form of a written contract between the

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Grand Lodge and each individual member of the order, by which the Grand Lodge promises to pay to the insured member, or his beneficiary, a specified sum, provided the member pays specified assessments" and complies with the constitution and by-laws of the defendant. And the answer of each appellee to that is, having in mind the attitude of the president of the defendant Brotherhood, and his power, and what has transpired in conjunction with the Pinkerton matter, the court ought to enjoin the threatened revocation of their charter in order that their insurance rights may remain secure. Appellant claims that the contracts of insurance which the members of the subordinate lodge own will, to use the language of appellant's brief, "remain unaffected by the revocation of the charter of Lodge No. 752." The difficulty seems to be in determining how (under the constitution and rules) the insurance rights of a former member of a defunct subordinate lodge (assuming its charter revoked) may be preserved, so that, without any fault on his part, neither he nor his beneficiaries may lose their rights.

Appellant contends that if the charter of Square Deal Lodge were revoked, President Lee could do one of two things: First, grant the members dispensations if they requested it, which would enable them to apply to some other lodge for admission (although such other lodge would have the right to reject their application); or second, transfer them upon their application to other lodges. It is to be observed, however, that the "dispensation" and "transfer" are not rights which the former members of a defunct lodge can enforce, but seem to be privileges only to be granted at the caprice, perhaps, of the president. It does not seem reasonable to allow the property rights of such members to be subjected to such uncertainty, especially without evidence of fault on their part.

Appellants contend that even if the appellees would

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suffer damages as the result of the proposed action of the appellant Lee, it would, at most, give rise to an action at law. We are, however, of the opinion that the proposed threat, if carried out, would have given rise to damages which could not accurately be measured without complicated accountings and a multiplicity of suits, and that the case was, in consequence, one of which a court of equity might properly take cognizance. The question, then, squarely arises as to whether the proposed action of the appellant Lee would have been lawful, for, if unlawful, it presented a proper case for the action of a court of chancery. There is no doubt but what an organization such as the Brotherhood in question clearly has the right to make reasonable regulations governing the conduct of its members, and subordinate lodges, and in a proper case remove a member or revoke the charter of a subordinate lodge. In the present case, the appellant Lee threatened to revoke the charter of a subordinate lodge on account of its refusal to find Pinkerton guilty of certain charges upon which he had been tried and acquitted. In other words, the action threatened by Lee was the arbitrary revocation of a charter of a lodge on account of its failure to do his bidding. A careful examination of the Brotherhood's constitution fails to show that any such tyrannical authority has been invested or attempted to be invested in the president of the organization. The question of whether a rule conferring such autocratic authority upon an officer could be sustained as reasonable, in view of the unfortunate consequences which would naturally follow from its enforcement, is not properly before us, and we base our decision upon the fact that the trial of Pinkerton was a matter over which the subordinate lodge had jurisdiction, and there was no authority given to the president of the organization to discipline the lodge on account of the conclusions which it might reach in the matter.

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Being of the opinion, as we are, that President Lee, under the constitution and rules of the organization, did not have the right to revoke the charter of Square Deal Lodge No. 752 because it refused to rescind its action of February 9, 1913, when by a vote of forty to one it found Pinkerton not guilty, and that a revocation of its charter would seriously imperil the insurance rights of its members, the writ of injunction was properly issued and made permanent. Where an organization, such as the defendant, undertakes to violate its constitution and rules, and by doing so injuriously affects the substantive insurance or property rights of its members, they are then entitled to seek relief in a court of equity.

It is claimed, also, that the bill of complaint is filed prematurely, inasmuch as the appellees did not appeal to the Grand Lodge. Such an appeal, however, to a tribunal at whose head is the president, and which tribunal only meets once in three years, is not a reasonable remedy, when meanwhile insurance claims may mature and remain unpaid and the beneficiaries suffer. The appellant has undertaken to distinguish the case of *Golden Star Lodge No. 1 v. Watterson*, 158 Mich. 696, and in some ways it is distinguishable. However, it very strongly supports the principles contended for by appellee and which are applicable and especially pertinent to the facts in the case at bar.

We are, therefore, of the opinion that the decree of the chancellor should be affirmed.

Affirmed.

Hollenbach et al. v. Hardin, 205 Ill. App. 528.

**Elias Hollenbach and Martha Hollenbach, Appellees,
v. Ellen A. Hardin et al., Appellants.**

Gen. No. 21,906. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. MAZINI SLUSSER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded. Opinion filed May 9, 1917.

Statement of the Case.

Action by Elias Hollenbach and Martha Hollenbach, plaintiffs, against Ellen A. Hardin, Patrick K. Hardin and F. W. Leland, defendants, to recover for damages done to plaintiffs' premises in taking a safe therefrom. From a judgment for plaintiffs for one hundred dollars, defendants appeal.

WICKETT, WALKER & WEGG, for appellants, Ellen A. Hardin and Patrick K. Hardin.

RANKIN, HOWARD & DONNELLY, for appellees.

MR. JUSTICE TAYLOR delivered the opinion of the court.

Abstract of the Decision.

MASTER AND SERVANT, § 1*—*when relation does not exist.* Where the owner of a certain safe hired a certain licensed expressman to move the safe from the premises of a third party, and in doing so the expressman acted independently of the owner and according to his own notions and such methods as he thought best, and with his own assistants, *held* that there was no relation of master and servant between the owner and the expressman, and the former would not be liable for the latter's negligence or trespass upon such third party.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Marcella Wistafka, by Elizabeth Wistafka, Appellee,
v. Peter M. Grotowski and Clemenz Blonder, Ap-
pellants.**

Gen. No. 21,945.

1. **ANIMALS, § 39***—*when unnecessary to prove scienter in action for injuries by dog.* In a cause of action for plaintiff being bitten by defendant's dog, based upon defendant's violation of a city ordinance requiring a dog running at large to be muzzled as distinguished from the common-law action for negligence, *held* that it would not be necessary to allege or prove defendant's scienter.

2. **ANIMALS, § 48***—*when instruction properly refused as based on wrong theory in action for injuries by dog.* An instruction, in an action to recover damages for plaintiff being bitten by defendant's unmuzzled dog, based upon defendant's violation of a city ordinance requiring all dogs to be muzzled, which was based upon a theory that it was necessary to allege and prove defendant's scienter, *held* properly refused.

3. **EVIDENCE, § 458***—*when evidence on former trial is inadmissible.* Evidence on a former trial under an issue involving scienter on the part of defendant, *held* properly rejected in an action for injuries by a dog, where scienter on defendant's part was not an issue.

Appeal from the Superior Court of Cook county; the Hon. M. L. McKINLEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed May 9, 1917. *Certiorari* denied by Supreme Court (making opinion final).

P. R. BOYLAN and HARRY H. FELGAR, for appellants.

JULIUS LIMBACH, for appellee; GEORGE F. ORT, of counsel.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the defendant, from a judgment in a suit brought by a minor, by her next friend, for damages which were alleged to be the result of the defendant permitting a dog owned or kept by him to

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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run at large, in the city, without being muzzled, in violation of a city ordinance. The case has been tried three times and a verdict rendered in favor of the plaintiff in each instance.

On June 18, 1909, Marcella Wistafka, at that time a child about nine years of age, was bitten by a dog, which was unleashed and unmuzzled, while she was crossing some vacant lots on her way to school, and subsequently, by her next friend, she brought suit for personal injury. The amended declaration, upon which the case was tried, avers that on June 18, 1909, the defendant owned and controlled and kept a certain dog, in the City of Chicago; that there was in force in the City of Chicago an ordinance which provided, *inter alia*, that "no person shall cause or permit any dog owned or kept by him to run at large * * * unless such dog shall be securely muzzled," etc., that "the owner or keeper of a dog who shall suffer such a dog to run at large at any time, in violation of the ordinance, shall be fined," etc.; that the defendant permitted the dog, unmuzzled, to run at large in a public place, and while the minor was exercising due care, said dog attacked and bit her, whereby she has been permanently injured.

The defendant filed a plea of the general issue. The case was tried before a jury, and after the evidence was all in, the plaintiff withdrew the two additional counts, which alleged scienter on the part of the defendant, leaving one count (as above set forth) charging a violation of the city ordinance, as the proximate cause. There had been a former trial in which a judgment had been rendered against the defendant in the sum of five hundred dollars, which was appealed to this court and reversed and remanded, on the ground that the proof failed sufficiently to show that the dog belonged to the defendant. [187 Ill. App. 285.] When the case was redocketed and retried, it was, upon the

count in the amended declaration, based upon a violation of the city ordinance.

It is claimed by the defendant: (1) that there was no allegation and proof of scienter; (2) that the court erred in not inspecting the certificate of evidence used in the Appellate Court in the former trial; (3) that the court erred in refusing to give instruction number *four* for the defendant, and giving instruction number *six* for the plaintiff.

As to the first contention: We are of the opinion that in a cause of action, such as this, based on the violation of the ordinance as distinguished from the well-known common-law action for negligence, it is not necessary to allege or prove scienter on the part of the defendant. *Behrle v. Hust*, 199 Ill. App. 437.

In *United States Brewing Co. v. Stoltenberg*, 211 Ill. 531, Mr. Justice Magruder said: "Inasmuch, therefore, as the City Council of Chicago had the power to pass the ordinance (referring to a speed ordinance), set up in the additional count and introduced in evidence in the case at bar, such ordinance has the force and effect of a statute. Its violation constitutes a prima facie case of negligence, if such violation caused the injury, which resulted in the death of the deceased." Likewise, in *H. Channon Co. v. Hahn*, 189 Ill. 28, the court said: "A breach of this ordinance as alleged in different counts of the declaration was clearly established by the proof, and this constituted a prima facie case of negligence, if the violation of the municipal law caused or contributed to the personal injury received by the appellee." *Cada v. The Fair*, 187 Ill. App. 111. In the latter case, the sale of a toy firearm to a minor, in violation of an ordinance, was stated to be sufficient to give rise to a cause of action for injuries received, providing it was alleged in the declaration that the minor was in the exercise of due care. The ordinance in question, in the pres-

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ent case, gives rise perforce to new civil obligations, and if the violation of such an ordinance is the proximate cause of a personal injury, an action for damages may be maintained. It could make no difference whether the defendant knew the propensities and habits of the dog, because the law, that is the ordinance, provided that when off the defendant's place it must be muzzled or under leash. If he had complied with the ordinance the minor would not have been bitten by the dog, even though the defendant had no knowledge of the dangerous nature of the dog. The plaintiff was entitled to assume that the defendant would comply with the ordinance. The obligations which the ordinance imposed upon the defendant, a breach of which proximately resulted in the injury to the minor, did not exist at common law. That the plaintiff may recover, where the violation of an ordinance is the proximate cause of the injury, is an illustration of the elasticity and reasonableness of the law, which adjusts and applies itself to new rights and new obligations. At common law without scienter, the owner of a dog might be blameless, but under the ordinance whether he knows or not he may be liable. Knowledge of the habits of the dog is entirely negligible. He is not blameless if he does not know the habits of the dog and yet violates the ordinance. Since the ordinance in question was passed, dogs are allowed to go unmuzzled or unleashed only at their owner's peril. In the extreme case of *feræ naturæ*, knowledge on the part of the owner is conclusively presumed, and therefore no question of scienter arises. In the instant case, that of a domestic animal, knowledge is not conclusively presumed, but by reason of the ordinance is rejected as a subject of defense. The gist of the action at common law is keeping a vicious animal with knowledge; that of the present action, permitting the animal to go at large, unmuzzled or unleashed.

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The instruction, number *four*, which the defendant claims was erroneously refused, was based upon the theory of scienter and therefore was properly refused. The instruction, number *six*, which was given and objected to by the defendant, is a correct statement of the law in the case and so was properly given.

The record of the evidence taken at the former trial, which was offered for the inspection of the trial judge, whatever that may mean, was properly rejected as the issues concerning which that evidence was offered originally involved scienter and, therefore, were not the same as those in the case at bar.

As there was ample evidence to support the verdict of the jury, both as to liability and amount, and as there are no material errors in the record, the judgment is affirmed.

Affirmed.

Sam Diamond, Appellee, v. Max Goldstein and Sarah Goldstein, Appellants.

Gen. No. 22,027. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1916. Affirmed. Opinion filed May 9, 1917. Rehearing denied May 22, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Sam Diamond, plaintiff, against Max Goldstein and Sarah Goldstein, defendants, to recover "for unlawfully, fraudulently and maliciously converting and appropriating to their own use the property of the plaintiff," consisting of certain furs and dress goods, valued at \$1,500. From a judgment for plaintiff for \$1,672.55, on remittitur of \$75, defendants appeal.

Diamond v. Goldstein et al., 205 Ill. App. 533.

B. M. SHAFFNER, for appellants.

MAURICE ALSCHULER, for appellee; MENZ I. ROSENBAUM, of counsel.

MR. JUSTICE TAYLOR delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 8*—*when statement of claim is in conversion giving court jurisdiction.* The use of the words "unlawfully, fraudulently and maliciously" in a statement of claim in the Municipal Court for "unlawfully, fraudulently and maliciously converting certain property" of the plaintiff, *held* not to change the nature of the charge against the defendants or affect the jurisdiction of the Municipal Court in such action for conversion of the property.

2. TROVER AND CONVERSION, § 39*—*what evidence is sufficient to show conversion of purchased stolen property.* Testimony of a thief that the property stolen by him from the plaintiff was listed by the thief's partner and that he had everything on the list shown to the defendants, charged with conversion of plaintiff's property stolen from him, when defendants bought such property, *held* sufficient identification and enumeration of the property to justify the jury in concluding what property belonging to the plaintiff was actually received and converted by defendants.

3. TROVER AND CONVERSION, § 38*—*when evidence as to value of goods is properly admitted.* In an action to recover for conversion by defendants of certain furs belonging to plaintiff, where a witness was asked if he had computed the fair, reasonable market value "of all these furs," to which he answered he had, and also answered a subsequent question, over objection overruled, as to the amount, *held* that the objection was not well founded, as the evidence showed that both parties must have known exactly to what furs reference was made.

4. TROVER AND CONVERSION, § 39*—*when plaintiff only required to establish case by preponderance of evidence.* Where a statement of claim charged defendants with "unlawfully, fraudulently and maliciously converting certain property" of the plaintiff, *held* that the words used did not necessarily charge a crime, and plaintiff was required to establish the material issues in such claim only by a preponderance of the evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Chicago & Vicinity Hungarian Benevolent Society, Appellee, v. Chicago & Suburb Hungarian Aid Society (Defendant). Alphonse Lefkow, Appellant.

Gen. No. 22,442. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed. Opinion filed May 9, 1917.

Statement of the Case.

Bill by Chicago & Vicinity Hungarian Benevolent Society, a corporation, complainant, against Chicago & Suburb Hungarian Aid Society, a corporation, defendant, for review of a certain prior suit wherein decree was entered providing that the clerk of court should pay to Alphonse Lefkow \$500 for his reasonable attorney's fees and certain costs and in satisfaction of a certain judgment, and \$116.33 additional out of certain funds in the hands of said clerk, charging that said Lefkow was guilty of fraud in so providing in said decree and in obtaining said sums. From an order adjudging said Lefkow guilty of contempt of court for failure to pay over said sums to the clerk of court as required by prior order of the court, said Lefkow appeals.

FRANK H. CULVER and IRENE M. LEFKOW, for appellant.

CHARLES R. WHITMAN, for appellee.

MR. JUSTICE TAYLOR delivered the opinion of the court.

C. & V. H. Benev. Society v. C. & S. H. Aid Society, 205 Ill. App. 535.

Abstract of the Decision.

1. EQUITY, § 451*—*what constitutes a consent decree.* A decree entered upon examination and approval by a master in chancery and to have the "O. K." thereon of the solicitors of both parties to the suit, *held* to be a consent decree.

2. CONTEMPT, § 68*—*when chancellor may consider whole record.* In a contempt proceeding, where the conduct of a solicitor of record is in question, a chancellor has authority to consider the whole record before him.

3. EQUITY, § 556*—*what decree not set aside on bill of review.* A consent decree is not subject to be set aside on bill of review.

4. EQUITY, § 574*—*when bill of review is not demurrable.* A bill of review charging only errors apparent on the face of the decree sought to be reviewed is not demurrable.

5. EQUITY—*when answer to bill of review should not be stricken.* If a bill of review sufficiently charged fraud in obtaining the decree sought to be reviewed, defendant's answer, filed without leave, in justification of the charge should not be stricken from the record and be denied a hearing thereon.

6. EQUITY, § 582*—*what relief may be granted on bill to review consent decree.* On a bill to review a consent decree and answer to the bill, *held* that the chancellor would be authorized only to revise the terms of such decree and not to order payment of money to a third person, as the clerk of the court.

7. CONTEMPT, § 31*—*when order to pay money is not basis for order of.* An order upon a bill to review a certain consent decree to a party to pay to the clerk of the court, to await the disposition of the bill, a certain sum paid to such party under such decree, *held* no basis for an order of contempt upon such party for failure to pay such sum.

O'CONNOR, P. J., specially concurring.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Robert H. Ingersoll et al., Appellees, v. Joseph Brown & Company, Appellant.**Gen. No. 22,349. (Not to be reported in full.)**

Appeal from the Superior Court of Cook county; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and remanded. Opinion filed May 10, 1917.

Statement of the Case.

Action by Robert H. Ingersoll and others, plaintiffs, against Joseph Brown & Company, defendant, in trover, with the conventional form of count and a count adding to the averment of defendant's knowledge that the property was plaintiffs', that defendant "contriving and fraudulently intending craftily and subtly to deceive and defraud the plaintiffs, hath not yet delivered," etc. From a judgment for plaintiffs, defendant appeals.

HEBEL & HAFT, for appellant.

HENRY W. LEMAN, for appellees; FRANK H. CULVER, of counsel.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. FRAUD, § 19*—*what is not actionable.* The making of a promise with intent at the time not to perform it does not constitute a fraud and is not actionable.

2. TROVER AND CONVERSION, § 31*—*when proof of demand and refusal essential.* Where plaintiffs refused to ship to defendant certain goods ordered by defendant until a balance due on a bill for goods previously shipped to defendant was paid, and defendant

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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promised to send a check for such balance that night but did not, and the goods were afterwards sent and delivered to defendant, against whom on the following day an involuntary petition in bankruptcy was filed, held that an action in trover based upon such facts as constituting fraudulent and wrongful possession, because, as claimed, defendant obtained the goods without intending to fulfil its promise to pay for them, would not lie without proof of demand and refusal, and motion for an instructed verdict for defendant should have been allowed.

8. TROVER AND CONVERSION, § 31*—*when notice of election to rescind conditional contract of sale of goods and demand for return is essential.* No right of action, in trover for goods sold and delivered upon condition that a certain balance due on a bill for other goods be paid, would accrue without notice by plaintiffs of their election to rescind the contract and a demand for the return of the goods, upon defendant's failure to make such payment.

**John J. Gormley, Appellee, v. Anna Vydarena et al.,
trading as Lederer Brothers (Defendants). Ru-
dolph Lederer and Samuel Lederer, Appellants.**

Gen. No. 22,775. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed May 21, 1917.

Statement of the Case.

Bill by John J. Gormley, complainant, against Anna Vydarena, Paul Vydarena, and Rudolph Lederer and Samuel Lederer, trading as Lederer Brothers, defendants, to apply property standing in the name of the defendant Samuel Lederer to the satisfaction of a judgment for \$5,050 recovered by complainant against the defendant Anna Vydarena. From a decree ordering the defendants to pay to complainant \$5,013, with

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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interest, and costs within ten days or to surrender and deliver to a certain master in chancery of the court and transfer to said master all title, right and interest had or claimed by the defendant Samuel Lederer in and to a certain certificate of purchase to the property in question, defendants Rudolph Lederer and Samuel Lederer appeal.

SABATH, STAFFORD & SABATH, for appellants; CHARLES B. STAFFORD, of counsel.

McMAHON & CHENEY, for appellee; FRANK L. CHENEY, of counsel.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

1. CREDITORS' SUIT, § 56*—*when evidence is sufficient to show fraudulent procurement of loan and use of proceeds.* Evidence held sufficient to show that certain of the defendants, the judgment debtor and her husband, obtained possession of complainant's money deliberately and by the use of grossest fraud, that they did not obtain a loan of money from the other defendants for the purpose of enabling them to get possession of the certificate of purchase of certain real estate in question, and that they in fact used complainant's money to procure the certificate.

2. CREDITORS' SUIT, § 56*—*when evidence is sufficient to show fraudulent assignment of certificate of purchase of real estate.* Evidence held sufficient to warrant the finding that the assignment of a certificate of purchase of certain real estate in question by the judgment debtor defendant to another defendant was done for the purpose of defrauding the debtor's creditors and in particular the complainant, and was without consideration in a creditor's bill on such judgment.

3. EQUITY, § 813*—*what evidence is sufficient to overcome allegation of sworn answer.* The allegations of defendants' sworn answer which directly met the allegations of the bill, held overcome by the testimony of two witnesses or the equivalent thereof.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Butchers' Advocate Co. v. Autovacuum Refg. Co., 205 Ill. App. 540.

4. EQUITY, § 303*—*who has burden of proof as to new matter alleged in answer.* The burden of proof of new matter alleged in an answer to a bill, held to be upon the defendant.

5. APPEAL AND ERROR, § 365*—*what is effect of failure to make objection and note exception at proper time.* Failure to make objection and note exception at the proper time during the course of a trial, held to operate as a waiver of the right to present the merits of the controversy on appeal.

Butchers' Advocate Company, Appellee, v. Autovacuum Refrigerating Company, Appellant.

Gen. No. 22,778. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. ARNOLD HEAP, Judge, presiding. Heard in this court at the October term, 1916. Reversed and judgment here. Opinion filed May 21, 1917.

Statement of the Case.

Action by the Butchers' Advocate Company, a corporation, plaintiff, against the Autovacuum Refrigerating Company, a corporation, defendant, to recover under a contract for advertising. From a judgment for plaintiff for eighty-four dollars, defendant appeals.

The contract sued on provided:

"Chicago, Dec. 21, 1914.

"The undersigned hereby authorize the Publisher of The Butchers' Advocate to insert our advertisement to occupy 5 inches every other week in the Butchers' Advocate, for three months and thereafter until the publisher has order to discontinue the advertisement for which we agree to pay \$6.00 (six dollars) per insertion.

AUTOVACUUM REFRIGERATING COMPANY

Per W. J. Kelly."

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Butchers' Advocate Co. v. Autovacuum Refg. Co., 205 Ill. App. 540.

January 11, 1915, defendant claimed to have mailed plaintiff a certain letter stating it was not ready to deliver certain cuts for the advertisement, and February 3, 1915, a letter that it had decided not to do any advertising just then.

MAXIMILIAN J. ST. GEORGE, for appellant.

ELBERT C. FERGUSON, for appellee.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 138*—*when notice to produce original letter is unnecessary as basis for secondary.* Copies of certain letters shown to have been regularly mailed by defendant to plaintiff, held admissible in evidence, notwithstanding no notice was given plaintiff of defendant's intention to introduce secondary evidence of the contents of such letters or demand made upon plaintiff to produce same in court, it appearing that the letters were not in plaintiff's possession at the time of trial.

2. EVIDENCE, § 39*—*when presumed that letters were received.* A showing that certain letters had been regularly mailed by defendant to plaintiff, held to give rise to a presumption that they had been received.

3. CONTRACTS, § 193*—*when letters subsequently written are not part of contract.* Where, after entering into a certain contract with plaintiff for certain advertising, defendant wrote several letters to plaintiff to the effect that it was not ready to or had decided not to advertise, such letters held not part of the contract and not to affect plaintiff's right of action under the contract.

4. CONTRACTS, § 384*—*when notice of intention not to be bound by contract beyond time limited is shown.* Evidence held sufficient to show that plaintiff had notice that defendant did not intend to be bound by the contract of advertising sued on beyond the period fixed therein.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Blanks v. Mills, 205 Ill. App. 542.

**Emma K. Blanks, Appellee, v. W. H. Mills et al,
Appellants.**

Gen. No. 22,781. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed May 21, 1917.

Statement of the Case.

Action by Emma K. Blanks, plaintiff, against W. H. Mills, Dan Macknett and Frank C. Fishback, defendants, upon a *narr* and *cognovit* on a lease. From an order denying defendants' motion to vacate the judgment for four hundred and twenty dollars, taken by confession, defendants appeal.

MEAGHER, WHITNEY, RICKS & SULLIVAN, for appellants; FRED L. BLACKINGTON and W. H. MILLS, of counsel.

ERNEST W. CLARK, for appellee.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

1. JUDGMENT, § 82*—*how affidavit in support of motion to vacate is construed.* An affidavit in support of a motion to vacate a judgment by confession is to be construed strictly against the party presenting such affidavit.

2. JUDGMENT, § 82*—*what are essentials of affidavit in support of motion to vacate.* An order to vacate a judgment regularly entered in a cause will not be entered unless upon a statement of the facts relied on in the affidavit for the entry of such order; conclusions of the pleader are not sufficient.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Carlin v. Peerless Gas Light Co., 205 Ill. App. 543.

3. JUDGMENT, § 82*—*when affidavit in support of motion to vacate by confession is insufficient.* An affidavit filed in support of a motion to vacate a judgment by confession regularly entered stating merely that the lease sued on had been canceled and terminated on a certain date and that the plaintiff had failed and refused to re-rent the premises described in the lease although numerous opportunities for so doing had been offered, *held* not to unequivocally state facts from which the trial court would be authorized to believe the defendants had a good and meritorious defense to the action.

Nellie Carlin, Administratrix, Appellee, v. Peerless Gas Light Company, Appellant.

Gen. No. 22,787. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. JOSEPH H. FITCH, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed May 21, 1917. Rehearing denied June 4, 1917.

Statement of the Case.

Action by Nellie Carlin, administratrix of the estate of Max Glick, deceased, plaintiff, against the Peerless Gas Light Company, a corporation, defendant, to recover for the death of plaintiff's intestate while in defendant's employ. From a judgment for plaintiff for \$5,000, defendant appeals.

The declaration alleged that the defendant, Peerless Gas Light Company, a corporation, on April 9, 1903, was engaged in the business of manufacturing burners, mantles, etc.; that in the doing of such business it occupied and used a certain floor or floors of a building in the City of Chicago; that the defendants Ida Hambrook and Adele T. Bassett on said date owned

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Carlin v. Peerless Gas Light Co., 205 Ill. App. 543.

and managed said building; that the building contained a certain elevator shaft, running through and past the different floors of the building; that at the time aforesaid plaintiff's intestate was employed by the defendant corporation, and that it thereupon became and was the duty of such defendant to provide plaintiff's intestate, Max Glick, with a reasonably safe place in which to work; that it was the duty of the other said defendants to keep and maintain the elevator shaft in question in a reasonably safe condition, so that persons rightfully in and upon the premises would not be injured.

It was further averred that the defendant corporation in disregard of its duty allowed and permitted a certain large number of boxes, bales or barrels to be piled up in its plant or factory, "so that by reason thereof they became and were dangerous and unsafe"; that the other defendants, owners of the building, negligently permitted the elevator shaft to be unprotected and unguarded at or near the floor of said building occupied by the defendant corporation, and in proximity to which the said barrels, bales or boxes were so piled; that while plaintiff's intestate was at work for the defendant corporation at the place aforesaid, and in the exercise of due care for his own safety, the said pile of boxes, barrels or bales was caused to and did totter, and some of the said boxes, barrels or bales by reason thereof were caused to and did fall upon plaintiff's intestate while he, in the exercise of due care, was in the act of getting "out of the way of said barrels, boxes or bales, as aforesaid, when he was caused to and did fall down and through said elevator shaft or hoistway to and upon the ground or basement floor, and which said fall was caused by the joint and concurrent negligence of the said defendants"; that by reason of such fall plaintiff's intestate was killed, etc.

MAYER, MEYER, AUSTRIAN & PLATT, for appellant;
ABRAHAM MEYER, of counsel.

DARROW, MASTERS & WILSON and J. L. BAILY, for
appellee.

MR. JUSTICE DEVER delivered the opinion of the
court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 123*—*what part of premises need not be kept safe.* An employer is under no obligation to a servant to keep in a safe condition that part of his premises where the duties of the servant do not require his presence.

2. MASTER AND SERVANT, § 535*—*when declaration shows that death of employee occurred at place of employment.* The declaration held to sufficiently set forth that the accident which caused the death of plaintiff's intestate occurred at a place where the deceased was, in the course of his employment, at work for the defendant.

3. MASTER AND SERVANT, § 699*—*when evidence sufficient to show that employee was properly at place of accident.* Evidence held sufficient to warrant the finding that plaintiff's intestate in the course of his employment for the defendant was properly at the place where the accident resulting in his death happened.

4. MASTER AND SERVANT, § 127*—*when rule that employer not required to keep place safe where conditions are changing has no application.* The rule that an employer is not required to keep in a reasonably safe condition a place where a servant is at work where the conditions of such place are constantly changing, as in the construction of a bridge, has no application where an employee's death was not caused by any changing condition in the prosecution of the work.

5. MASTER AND SERVANT, § 699*—*when evidence insufficient to show that servant had timely warning of movement of boxes.* In an action for the death of a servant due to the falling of certain boxes which precipitated him into an unguarded elevator shaft, evidence held insufficient to show that plaintiff's intestate had warning of the movement of the boxes in time to have avoided them.

6. MASTER AND SERVANT, § 706*—*when question whether servant was working at place of accident at time of death is for jury.* The question whether plaintiff's intestate was at and immediately before

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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his fall down an elevator shaft whereby his death occurred, working at the place where the accident happened, *held* properly submitted to the jury upon evidence admitted to sustain the theories of both parties to the action.

7. WITNESSES, § 253*—*when credibility of witness is for jury.* Where a statement in writing made by a certain witness shortly after an accident to plaintiff's intestate, resulting in the death of such intestate, tended to contradict in important particulars the testimony of such witness as the only eyewitness of the accident testifying on behalf of the plaintiff, *held* that it was the province of the jury to determine the credence to be given such testimony.

8. MASTER AND SERVANT, § 782*—*when instruction properly refused as not in conformity with evidence.* An instruction based upon the finding by the jury that plaintiff's intestate was at the place where the accident resulting in his death occurred contrary to instructions given him by his forewoman in his employment for defendant, *held* properly refused where there was no evidence referred to from which it could be inferred that the deceased had been directed by the forewoman not to be at such place.

9. DEATH, § 39*—*when demurrer to plea of statute of limitations is properly sustained.* In an action for the recovery of damages for wrongfully causing the death of plaintiff's intestate, brought after one year and within two years after such death, where the law in force at the time of such death providing that such actions should be commenced within two years after the death of the person was amended after the death of plaintiff's intestate so as to provide that such actions should be brought within one year after the death, *held* that a demurrer to defendant's plea that such action was not brought within one year after the death of plaintiff's intestate was properly sustained, as the act was not retrospective.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Annie Ball, Appellant, v. Iroquois Memorial Emergency Hospital et al., Appellees.

Gen. No. 22,790. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. HARRY C. MORAN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed May 21, 1917.

Statement of the Case.

Action by Annie Ball, plaintiff, against the Iroquois Memorial Emergency Hospital, Richard T. Crafe, L. P. Friestedt Company, Lanquist & Illsley Company, John E. O. Pridmore, City of Chicago and Murdock Campbell, defendants, to recover damages for injuries to plaintiff's party wall. From a judgment for defendants, plaintiff appeals.

Plaintiff was the owner of premises known as No. 25 North Market street, Chicago, improved by a four-story brick building. A party wall agreement existed as to this building and a similar building immediately south on premises known as No. 23 North Market street, leased for 99 years by one of the defendants and released from August 1, 1908, to the City of Chicago for a term of years. Between May 1 and September 1, 1910, the latter building was torn down and a new building erected on that lot. Immediately south of that lot was an alley and south of the alley property known as the Hearst property, on which in the summer of 1910 a large number of caissons were sunk for the erection of a building thereon. The lots Nos. 23 and 25 North Market street were each twenty by seventy feet in dimensions. The new building on the former lot was erected on the old foundation.

Ball v. Iroquois Memorial Emergency Hospital, 205 Ill. App. 547.

F. L. SALISBURY and M. MARSO, for appellant.

PAIN, CAMPBELL & KASPER, CHARLES E. PAIN and SAMUEL A. ETTELSON, for appellees; RALPH G. CRANDALL, of counsel.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

1. ADJOINING LANDOWNERS, § 6*—*when evidence is sufficient to show injury by person other than lessee of party wall.* Evidence held sufficient to sustain the finding that the damage to plaintiff's building, if any, consisting of the falling of a party wall and other damage, was the result of work done on another than defendants' property and was not caused by any conduct of commission or omission of the defendants, lessées of a party wall.

2. DAMAGES—*when evidence as to loss of profits is properly excluded.* Evidence held to furnish no basis of fact for the introduction of evidence of the loss of profits to plaintiff's business as an element of damages claimed, in an action to recover for being deprived of the use of a certain building in which plaintiff conducted such business, where plaintiff kept no record, books or papers other than certain mail orders, which were destroyed from year to year, and a bank pass book, which could not be found, and such evidence as to loss of profits was properly excluded.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

John Morrison, Appellant, v. John R. Lavery, Appellee.

Gen. No. 22,810. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. FRED C. HILL, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed May 21, 1917.

Statement of the Case.

Action by John Morrison, plaintiff, against John R. Lavery, defendant, to recover rent. From a judgment in favor of defendant, plaintiff appeals.

RYAN & LEWIS, for appellant.

LAMBERT & MAYER, for appellee.

MR. JUSTICE DEVER delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 369*—*when different theory of recovery may not be advanced on appeal.* On appeal by plaintiff from a judgment in favor of the defendant, the plaintiff cannot advance in the Appellate Court a theory of recovery different from that presented in the trial court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Devine v. Erie Railroad Co., 205 Ill. App. 550.

John F. Devine, Administrator, Appellee, v. Erie Railroad Company, Appellant.

Gen. No. 22,829. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. DAVID F. MATCHETT, Judge, presiding. Heard in this court at the October term, 1916. Reversed with finding of fact. Opinion filed May 21, 1917.

Statement of the Case.

Action by John F. Devine, administrator of the estate of George Hinzenstern, deceased, plaintiff, against the Erie Railroad Company, a corporation, defendant, to recover for the death of plaintiff's intestate. From a judgment of \$2,000 entered upon the verdict of a jury, defendant appeals.

W. O. JOHNSON, BULL & JOHNSON and GEORGE C. GALE, for appellant.

CHARLES A. CHURAN and WILEY W. MILLS, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. DEATH, § 50b*—*when evidence is sufficient to show that contributory negligence of deceased is proximate cause of death.* In an action to recover for death by wrongful act, evidence examined and held to show that the negligence of plaintiff's intestate was the primary cause of the accident which caused his death.

2. MASTER AND SERVANT, § 101*—*what is duty of master towards servant of independent contractor in place of danger.* The only duty owed by the employer of an independent contractor to the servant of such contractor who voluntarily puts himself in a place of danger, where his work does not require him to be, is to avoid wantonly or wilfully injuring him.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Anthony Morolewski, Appellee, v. Richard McCurrie et al., Appellants.**Gen. No. 22,848. (Not to be reported in full.)**

Appeal from the Circuit Court of Cook county; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in this court at the October term, 1916. Reversed with finding of fact. Opinion filed May 21, 1917.

Statement of the Case.

Action by Anthony Morolewski, plaintiff, against the American Laundry Machinery Company, Lord & Bushnell Company and Richard McCurrie, defendants, to recover for personal injuries. At the trial plaintiff took a nonsuit as to the American Laundry Machinery Company and the jury found in favor of Lord & Bushnell Company and returned a verdict against McCurrie, on which judgment was entered for \$2,650. From this judgment defendant McCurrie appeals.

LITZINGER, MCGURN & REID, for appellants.

JULIUS B. RUBENSTEIN and EDWARD J. GREEN, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. NEGLIGENCE, § 185*—*when evidence insufficient to support verdict.* Evidence in action to recover for personal injuries examined and held insufficient to support the verdict.
2. MASTER AND SERVANT, § 1*—*when evidence insufficient to show existence of relationship.* Evidence in action for personal injuries examined and held not to show existence of relation of master and

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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servant between defendant and the person through whose negligence the injuries were alleged to have been caused.

3. NEGLIGENCE, § 157*—*when burden of proof is on plaintiff.* In an action to recover for personal injuries alleged to have been caused by defendant's negligence, the burden of proving that plaintiff was in the exercise of due care, that his negligence did not contribute to cause the accident and defendant's negligence was the proximate cause of the injury, is on the plaintiff.

E. V. Bradley, Appellee, v. Progressive Metal & Refining Company, Appellant.

Gen. No. 22,855.

1. BILLS AND NOTES, § 327*—*what is unavailable as defense in action on note.* In an action to recover on a promissory note absolute on its face, an oral contemporaneous contract in contradiction of the terms of the note is unavailing as a defense.

2. BILLS AND NOTES, § 220*—*when subsequent indorsee may avail himself of title of first indorsee.* If a first indorsement of a note is valid and vests title to the note in the indorsee, such title may be availed of in an action by any subsequent indorsee and holder of the note.

3. PLEADING, § 153*—*when affidavit of merits is insufficient.* It is not sufficient to set forth on information and belief the material defenses in the affidavit of merits in an action on a note.

4. BILLS AND NOTES, § 351*—*when affidavit of merits insufficient to avoid assignment of note.* The statement in the affidavit of merits in an action against the maker of a note that the payee was the owner of the note at the time of maturity "in so far as any indebtedness which may be due from defendant to said payee," held to be ambiguous and not to constitute any fact which in law would operate to avoid the assignment of the note by the payee and continue the title in it.

5. BILLS AND NOTES, § 333*—*when allowance of set-off is improper.* In an action on a note, defendant's counterclaim in the nature of a set-off which is in excess of the amount of the note is repugnant to Hurd's Rev. St. ch. 98, sec. 12 (J. & A. ¶ 7633), limiting a set-off to the amount of plaintiff's debt.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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6. SET-OFF AND RECoupMENT, § 10*—*when set-off cannot be claimed.* Set-off cannot be claimed for unliquidated damages.

7. PLEADING, § 157*—*when filing of affidavit of merits is within discretion of court.* The allowance of a motion to file a third affidavit of merits rests in the sound discretion of the trial court.

Appeal from the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed May 21, 1917. Rehearing denied June 4, 1917. *Certiorari* denied by Supreme Court (making opinion final).

BEERNSTEIN, GROSSMAN & ZOLLA, for appellant.

BENJAMIN B. MORRIS, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

From a judgment of \$3,548 entered as in case of default, defendant appeals.

This action is upon a note for \$3,500, executed by defendant, payable to the order of the Chicago Smelting & Refining Company, sixty days after date, with interest at six per cent. per annum. Plaintiff is the second indorsee of this note. The note is dated at Milwaukee, Wisconsin, and on the ground that defendant was a nonresident of the State of Illinois, an attachment was issued and certain moneys garnisheed, but as defendant voluntarily appeared and gave bond, the questions arising on the attachment issue are not before the court. Defendant filed an affidavit of merits, which, on motion, was stricken, and by leave of court filed a new affidavit of merits. In their essence the two affidavits are of like purport, the second affidavit stating the facts recited in the first in greater elaboration. The affidavits of merits set up as defenses that the note was given in consideration of the payee delivering to the maker goods to the value of the note before its maturity, and that in this regard it had failed, and delivered goods to the extent only

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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of \$1,950; also setting up an account between the payee and defendant, in which the payee is alleged to owe to defendant a balance of \$40.85, and averring that the payee was the owner and holder of the note in suit at the time of its maturity "in so far as any indebtedness which may be due from this defendant to the Chicago Smelting and Refining Company"; that plaintiff is not the innocent holder for value before maturity and that defendant is informed and believes that the payee is the holder and owner of the note, and that therefore defendant is not indebted to plaintiff in any sum. Defendant further sets up that by reason of the transaction between itself and the payee in the note and by reason of the failure of the payee to carry out its contract made with defendant, that defendant "has been damaged in a large sum of money, and that the damages suffered by this defendant are in excess of the amount of said note set forth in the plaintiff's statement and affidavit of claim." After the striking of the second affidavit of merits, the court proceeded to assess damages on production of the note in evidence upon plaintiff's affidavit of claim under Rule 17 of the Municipal Court Act, which provides, *inter alia*, that "where the defendant's affidavit of merits is stricken from the files for insufficiency, the court may then and there enter judgment as in case of default for the plaintiff upon the plaintiff's affidavit of claim in said cause."

Defendant stated no fact in its affidavits of merits which in law constitutes a defense to the action upon the note in suit. The attempt to set up an oral contemporaneous contract in contradiction of the terms of the note is unavailing as a defense, as evidence of such contract would be incompetent as tending to vary the terms of an instrument absolute on its face. *Hesch v. Dennis*, 194 Ill. App. 663.

The assignment by the payee to Feinberg, the first

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indorsee, is in no wise challenged by the affidavit of merits, nor is it denied that such assignment was made before maturity and for a valuable consideration. It is the well-settled law of this State that a remote indorsee may avail of the title of any prior indorser, and if, as in the instant case, the first indorsement was valid and vested the title to the note in such indorsee, that title may be availed of in an action by any subsequent indorsee and holder of such note. The doctrine is as announced by Mr. Justice Scholfield in *Matson v. Alley*, 141 Ill. 284, in these words:

“And although Alley is an assignee after maturity, his assignor, Bliss, was an assignee before maturity, and Alley is entitled to stand in the place of Bliss, and no defense could be urged by the corporation as against Alley which it could not have urged against Bliss had he remained the owner of the notes and sought to enforce their collection.” *Woodworth v. Huntoon*, 40 Ill. 131.

In *Comstock v. Hannah*, 76 Ill. 531, it was held that a party who takes commercial paper before due, for a valuable consideration, without knowledge of any defects of title and in good faith, holds it by a title valid against the world.

As the assignment to Feinberg was not challenged, regardless of when and for what consideration plaintiff obtained the note, he may avail of Feinberg's unchallenged title and recover the amount due on the note. Furthermore, the material defenses set forth in the affidavits of merits are upon information and belief. This is not sufficient. *Hitchcock v. Herzer*, 90 Ill. 543.

Again, the statement in the affidavit that the payee of the note was the owner of the note at the time of maturity, “in so far as any indebtedness which may be due from defendant to said payee,” is ambiguous and does not constitute any fact which in law would operate to avoid the assignment of the note by the payee

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and continue the title in it for such restricted purpose notwithstanding such assignment. Defendant's counterclaim in the nature of a set-off, which it states is "in excess of the amount of said note set forth in plaintiff's statement and affidavit of claim," is repugnant to section 12, ch. 98, Rev. St. (J. & A. ¶ 7633), which limits a set-off to the amount of plaintiff's debt. See opinion in *Reid v. McKinney*, 202 Ill. App. 129.

It also appears that the set-off claimed is for unliquidated damages, which, it was held in *J. B. Madson & Co. v. Hogans*, 189 Ill. App. 589, cannot be done.

It is likewise contended that it was error for the court to deny defendant the right to file a third affidavit of merits. The allowance of such motion rested within the sound discretion of the court and we cannot hold that such discretion was abused in the denial of such motion, as defendant had been accorded every opportunity to state any defense which it might have against plaintiff's claim.

As neither of defendant's affidavits stated any facts which in law constitute a defense to the action, the judgment of the Municipal Court is affirmed.

Affirmed.

**Fred G. Hunter, Appellee, v., Bush Hat Company,
Appellant.****Gen. No. 22,859. (Not to be reported in full.)**

Appeal from the Municipal Court of Chicago; the Hon. CHARLES H. BOWLES, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed May 21, 1917.

Statement of the Case.

Action by Fred G. Hunter, plaintiff, against the Bush Hat Company, a corporation, defendant, to recover wages alleged to be due. Defendant put in a set-off for the value of certain property alleged to have been retained by plaintiff. On the cross-action plaintiff denied the indebtedness and claimed a settlement. On the trial before the court there was a finding against both the claim and the set-off and a judgment against plaintiff for costs, from which defendant appeals.

WILLIAM B. JARVIS, for appellant.

JOHN M. RANKIN, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 84*—*when evidence sufficient to support verdict.* Evidence in an action for wages, examined and held to support the verdict.
2. APPEAL AND ERROR, § 1749*—*when judgment affirmed.* On appeal from the finding and judgment in an action to recover wages, held that no error of law or procedure appeared justifying a reversal of the judgment.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Selz v. Stafford, 205 Ill. App. 558.

Emanuel F. Selz, Appellee, v. James W. Stafford, Appellant.

Gen. No. 22,871. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JACOB H. HOPKINS, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed May 21, 1917. Rehearing denied June 4, 1917.

Statement of the Case.

Action of the fourth class by Emanuel F. Selz, plaintiff, against James W. Stafford, defendant, in forcible detainer for the possession of certain premises and to recover rent alleged to be due. From a judgment in favor of plaintiff for \$2,358.19, defendant appeals.

C. VAN ALLEN SMITH, for appellant.

MAYER, MEYER, AUSTRIAN & PLATT, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 1170***—*when moot question not determined.* In an action brought to recover rent and for forcible detainer where, before the trial, possession of the premises is surrendered, it is not proper that the court determine the moot question as to possession.

2. **MUNICIPAL COURT OF CHICAGO, § 13***—*what is effect of striking affidavit of defense and counterclaim and proceeding with trial.* In an action of the fourth class where a defendant's affidavit of defense and counterclaim are stricken from the files and the cause proceeds to trial, defendant is in default and admits every material averment of plaintiff's claim.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

3. MUNICIPAL COURT OF CHICAGO, § 13*—*what need not be attached to statement of claim in action for rent.* In an action in the Municipal Court of Chicago to recover rent due under a lease, plaintiff is not required to attach a copy of the lease to his statement of claim or to offer it in evidence.

4. MUNICIPAL COURT OF CHICAGO, § 8*—*when jurisdiction not affected by commencement of action as of fourth class.* The fact that an action in the Municipal Court of Chicago was commenced as an action of the fourth class does not deprive that court of jurisdiction to enter judgment in excess of \$1,000.

5. MUNICIPAL COURT OF CHICAGO, § 28*—*when objection as to lack of jurisdiction is too late.* An objection that the Municipal Court of Chicago is without jurisdiction to enter judgment in excess of \$1,000, in an action commenced as an action of the fourth class, comes too late when first made on appeal.

6. MUNICIPAL COURT OF CHICAGO, § 8*—*what constitutes conceding of jurisdiction by defendant in action of fourth class.* Where defendant in an action of the fourth class in the Municipal Court of Chicago states in his affidavit of set-off and counterclaim that his damages exceed plaintiff's claim and also that his damages amount to \$20,000, he concedes the jurisdiction of the court to enter a judgment in favor of either party in excess of \$1,000.

7. LANDLORD AND TENANT, § 297*—*when tenant not entitled to apportionment of rent.* In an action to recover rent claimed to be due under a lease, where the amount claimed is admitted by defendant's default, defendant is not entitled to an apportionment of the rent by reason of his having surrendered the premises before the expiration of the time for which rent is sought to be recovered.

8. LANDLORD AND TENANT, § 311*—*when tenant may not offset against rent damages for interference with use of premises.* A tenant who continues in the use and occupation of the premises cannot offset against the rent, damages claimed to have been caused him by reason of inconvenience in the use and occupation of the premises and by reason of conduct of the landlord tending to interfere with their beneficial enjoyment.

9. SET-OFF AND RECOURPMENT, § 44*—*what is extent of right of set-off.* Under Hurd's Rev. St. ch. 98, sec. 12 (J. & A. ¶ 7633), a set-off is limited to the amount of plaintiff's claim.

10. SET-OFF AND RECOURPMENT, § 10*—*what is not subject of.* A claim for unliquidated damages can neither be set off nor recouped against a claim for liquidated damages.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kubiatowski v. Henry Pratt Boiler & Machine Co., 205 Ill. App. 560.

Ignacy Kubiatowski, Appellee, v. Henry Pratt Boiler & Machine Company, Appellant.

Gen. No. 22,876. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. JAMES S. BAUME, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed May 21, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Ignacy Kubiatowski, plaintiff, against Henry Pratt Boiler & Machine Company, defendant, to recover for personal injuries. From a judgment of \$5,000 for plaintiff entered upon a verdict of the jury after a remittitur from such verdict of \$3,000, defendant appeals.

W. G. SHOCKEY and C. W. GREENFIELD, for appellant.

S. P. DOUTHART and FRED C. SMITH, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 1447***—*when elimination of counts from declaration is not reversible error.* A judgment will not be reversed because the trial court eliminated from the declaration counts which served no useful purpose.

2. **DAMAGES, § 78***—*when remittitur may not be complained of.* One who voluntarily enters a remittitur cannot complain thereof on appeal.

3. **MASTER AND SERVANT, § 682***—*when evidence sufficient to show relation of vice principal.* In an action to recover for personal injuries alleged to have been caused by the negligence of defendant's vice principal, evidence examined and held to warrant a finding that the relation was that of vice principal and not that of fellow-servant.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Our Savior N. E. L. C. of C. v. F. I. C. of N., N. J., 205 Ill. App. 561.

4. MASTER AND SERVANT, § 751*—*when contributory negligence of servant is question for jury.* In an action by a servant to recover for personal injuries, the question of contributory negligence held to be for the jury.

5. MASTER AND SERVANT, § 701*—*when evidence sufficient to show that contributory negligence of plaintiff is not proximate cause of injury.* In an action by a servant for personal injuries, evidence examined and held to support a finding that the plaintiff's negligence was not the proximate cause of the injury.

6. MASTER AND SERVANT, § 683*—*when evidence sufficient to show negligence.* In an action by a servant for personal injuries, evidence examined and held to be sufficient to support a finding that defendant was guilty of negligence.

7. EVIDENCE, § 148*—*when exhibition of injured member is not error.* In an action for personal injuries, the exhibition of the injured member to the jury held not a ground for reversal.

8. DAMAGES, § 241*—*when verdict for personal injuries not excessive.* Verdict of \$8,000 from which a remittitur of \$3,000 was made, in an action for personal injuries, held not so excessive as to show passion or prejudice.

Our Savior Norwegian Evangelical Lutheran Congregation of Chicago, Appellant, v. Firemen's Insurance Company of Newark, New Jersey, Appellee.

Gen. No. 22,886. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed May 21, 1917. Rehearing denied June 4, 1917.

Statement of the Case.

Action by Our Savior Norwegian Evangelical Lutheran Congregation of Chicago, a corporation, plaintiff, against Firemen's Insurance Company, of Newark, New Jersey, a corporation, defendant. From a judg-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.
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ment entered on the verdict of the jury for \$105.53 for plaintiff, the latter appeals.

JOHN J. SONSTEBY, for appellant.

SEYMOUR EDGERTON, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 1751*—*when judgment affirmed on striking bill of exceptions.* Where, on appeal, the bill of exceptions has been stricken from the record, and the errors assigned are not solvable without reference to the bill, the judgment will be affirmed.

Florence M. Hazard, Appellant, v. Nathaniel T. Hazard, Individually and as Administrator et al., Appellees.

Gen. No. 22,888.

1. **DIVORCE**—*what is sufficient proof of service of notice by mail on nonresident.* In a suit against a nonresident for divorce, where notice is served by mail, proof of receipt of such notice is not required, but a certificate of the clerk that the notice was mailed is sufficient compliance with the statute.

2. **DIVORCE, § 45***—*when evidence sufficient to show notice of divorce proceedings.* On a bill of review to set aside a decree of divorce, evidence examined and held to show that complainant had knowledge and notice of the divorce and agreed to the terms of the decree.

3. **DIVORCE, § 67***—*when wife barred by laches from questioning default decree.* One who, with full knowledge of the pendency of a suit against her for divorce, acquiesces in and agrees to all that is done and accepts a financial settlement based thereon and does not question the decree until the husband has been dead more than

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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four years after the entry of the decree, is barred by laches from contesting such decree, especially where there is no reason for the delay and the rights of innocent third persons have intervened.

4. *DIVORCE—when depositions may be used.* On a suit for divorce, it is not required by the Act of 1874, sec. 8 (J. & A. ¶ 4223), that the witnesses be examined orally in open court, but they may be heard by deposition, the purpose of the act being only to prevent the reference of default divorce causes to masters in chancery.

Appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed May 21, 1917.

ELLIS & LEWIS and BLUIM & TEED, for appellant.

ALBERT CHANDLER, C. M. CLAY BUNTAIN and CLAYTON W. MOGG, for appellees.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an appeal from a decree dismissing a bill of review for want of equity. The decree involved is one of divorce for desertion obtained by the then husband of complainant on service by publication. The learned chancellor before whom the case was tried made a very searching inquiry into all of the facts and circumstances involved in the divorce proceeding and called complainant to the witness stand and examined her as the court's witness, allowing each of the parties to the litigation the latitude of cross-examination. While many errors are assigned on the record, the case really resolves itself into the pivotal one of absence of jurisdiction to enter the decree because, it is alleged, defendant was not served with process, either personally or by publication.

We have been furnished by counsel with a voluminous array of case law exceeding citations of more than one hundred sixty authorities, including the Bible, Magna Charta, the State and federal constitutions, and

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in scope covering many jurisdictions, which, to use a sententious remark of the late Mr. Justice Adams in *Salomon v. Estate of Wincox*, 104 Ill. App. 277, have about as much relation to the decision of this case as "The Lay of the Last Minstrel."

The bill of review in this case was instituted by complainant after the death of her former husband, and the administrators of his estate, one here and another in St. Louis, Missouri, were made parties defendant. The Cook county administration failed to procure assets, while the St. Louis administration disclosed an estate of something less than \$10,000.

To contend that complainant did not have notice and knowledge of the divorce suit from its commencement to its final determination would, in view of the record, be an affront to credulity. The procedure and the decree as shown by complainant's bill were regular. Complainant was proceeded against as a nonresident of the State of Illinois and as residing in the City of New York, that her then residence was at 164 West 74th street, New York City. A copy of the notice published in conformity with the affidavit of nonresidence was mailed, as provided by statute, to complainant, Florence Hazard, 164 West 74th street, New York City, State of New York. Another copy was mailed to complainant at New York City without any particular notation of address. The law does not require proof that complainant received a copy of the notice mailed. The clerk certified as to the mailing and we think that this was a sufficient compliance with the statute. Were it otherwise it might be impossible to prove that the complainant received the notice sent by mail unless forwarded by registered mail, for which the statute makes no provision. The default record in evidence proved the sending of the notice by mail to complainant and a compliance with the statute in this regard, and the decree recites that complainant had notice of the pend-

ency of the suit by publication according to the statute and that the default of complainant was taken and the bill taken as confessed against her. Then the court specifically finds that the husband, William Hazard, was an actual resident of Cook county at the time the bill was filed and had been a resident of the State of Illinois for more than one year next before the filing of the bill, and then finds the fact that subsequent to the marriage complainant, Florence Hazard, had been guilty of wilfully deserting and absenting herself from her husband without any reasonable cause, for the space of two years, as charged in the bill of complaint, and a decree dissolving the marriage followed. The decree was entered December 3, 1910, and William Hazard, complainant in the divorce bill, died intestate on the 3rd of February, 1914.

Complainant averred in her bill that she never either before or since the entering of the divorce decree had been summoned or served with a copy of the bill of complaint or received any notice by mail of the pendency of the suit as required by statute. This averment is not true, and counsel in a way abandoned the contention that complainant had no notice of the suit or of the trial of the case, but narrowed the contention to one that she did not receive a copy of the notice mailed to the address at 164 West 74th street, New York City. It appears from the admissions of complainant that at or about the time when the notice was mailed she did stay at 164 West 74th street, New York City. Her own testimony develops the fact that she employed counsel, a Mr. May in New York City, to come to Chicago and arrange with her husband about the settlement of their marital differences; that May came to Chicago and made such arrangements with the counsel of her husband and that she paid May \$300 for his services. After the divorce, complainant's husband made a financial settlement with complainant, by which

she received money and a large quantity of household furniture. Complainant wrote to her husband on February 7, 1911, saying: "I agree to the proposition of dividing the cash value of the policies (\$775.20). Any papers that I must sign can be forwarded. Florence M. Hazard, 175 W. 78th street, New York City." Complainant also accepted in her own handwriting service of a notice to take depositions which were subsequently taken and used on the hearing of the divorce case; so she had actual knowledge not only that the suit was pending, but that the depositions were to be taken to be used by her husband on the trial.

If complainant had any purpose of disputing her husband's claim to a divorce from her on the grounds stated in his bill, she had every opportunity to make such defense at the time; and she should not have permitted the matter to have proceeded to decree and to the financial settlement which was subsequently made between them if she had any purpose of contesting the divorce suit thereafter.

While it is true that a decree procured on service by publication is in its nature *nisi* until the expiration of three years, at the expiration of such three years it becomes absolute. Within these three years and during the lifetime of complainant's husband, if she for any reason were dissatisfied with the decree or the settlement, she could have appeared and demanded a hearing. What with the implication of service raised by the clerk's certificate of mailing the notice of publication to her in New York City, coupled with the further fact that she had actual knowledge of the pendency of the suit and negotiated in relation thereto and made a settlement which she indicated was satisfactory to her at the time, she is estopped after the death of her late husband from challenging the truth of these surface appearances.

While complainant in the first instance denied knowl-

edge of the pendency of the divorce suit, she subsequently, under an examination by the chancellor, admitted that she had such knowledge. Her denial at no time rested upon anything more than the technical one that she had not received the notice mailed to her by the clerk of the court at 164 West 74th street, New York City. This is evidently a subterfuge on her part in an attempt to avoid the consequences of her knowledge of all that had taken place. It is patent from all the evidence that the divorce was by arrangement between the parties, complainant being represented by Mr. May as her counsel, who came to Chicago and ascertained, we will assume, every fact material to be known to the adjustment of the marital differences between his client and her husband.

The evidence develops that complainant became dissatisfied with her husband by reason of his financial reverse of fortune. He had been in the receipt of \$3,000 a year, and was reduced to a salary of \$100 per month. It seems that complainant's husband was indebted to his mother and another relative at the time of the financial settlement and that some little time prior to the death of complainant's husband he inherited property from his mother and from one Elliott C. Jewett, and it is this fund which provokes this proceeding. The financial issue is really the only practical one involved and is the inspiring reason prompting complainant to seek to set aside the decree of divorce of which she had actual knowledge from the time it was rendered. Furthermore, it is fairly inferable from the testimony that complainant received a copy of the decree of divorce a very short time after that decree was entered.

Complainant is in a court of conscience. She is appealing for the adjustment of rights resting in conscience and to such she must be strictly held.

Complainant by this proceeding seeks a review of

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errors alleged in the divorce decree. Were that decree before us by writ of error, the same questions would arise as in the bill of review case. We think that *Mallory v. Mallory*, 160 Ill. App. 417, is very much in point both on fact and principle. The court there said: "We are of opinion that it would be inequitable and unjust to permit plaintiff in error to now prosecute this writ of error to a reversal of the decree for the sole purpose of permitting him to procure a share of the estate." This observation is equally applicable to Mrs. Hazard's case. While it is true Mrs. Hazard did not appear in court in her divorce suit, as a matter of fact she was represented in the suit by her counsel from New York, and the terms of the decree were agreed to by him for her and she ratified his actions in this regard *in toto*. The decree is therefore in the nature of a consent decree.

We are also of the opinion that complainant is barred from contesting the divorce decree by reason of laches, she having with full knowledge of all the circumstances acquiesced and agreed with all that was done, accepting the financial settlement and waiting until her husband had been dead nearly a year and more than four years after the entry of the decree, all of which shows a lack of diligence which a court of equity will not sanction.

Furthermore, the rights of innocent third parties have intervened, namely, the heirs of William Hazard. There is no explainable reason for such a delay. In *Maher v. Title Guarantee & Trust Co.*, 95 Ill. App. 365, which is a similar case, where a party with knowledge of the proceedings and of the decree of divorce took a sum of money agreed upon, it was held that delay alone, unless satisfactorily explained, would bar the right of attack.

An implication of laches arises from conditions which are not in dispute in this case. None of these

has complainant by any averment in her bill attempted to excuse.

Complainant also predicates lack of jurisdiction of the court to enter the divorce decree upon the fact that but one witness was heard orally, the rest of the witnesses being heard by deposition; that such a hearing does not fulfil the statutory requirement that witnesses shall be examined in open court; and *Suesemilch v. Suesemilch*, 43 Ill. App. 573, is the only case cited in which any reference so narrow can be found, and in that case the court said: "We do not wish to be understood as indicating that depositions may not also be received. In the present case we pass merely upon the question presented, as stated in this opinion."

In the *Suesemilch* case, *supra*, the decree was entered upon the oral examination of one witness and the deposition of another. With all due respect to the decision, we are unable to concur in its reasoning. The purpose of the Act of 1874 was not to compel all the witnesses to be examined in open court, but to prevent a default divorce cause from being referred to a master in chancery. A witness heard by deposition is as much heard in open court as is one who appears in person before the court. In contemplation of law the witness in the deposition is before the court, and equal effect is to be accorded to the testimony of witnesses produced by deposition as to those produced in open court and testifying *viva voce*; and the tests regarding the weight and character of such evidence are the same.

The demands of complainant are inequitable. The court entered the divorce decree with jurisdiction of the parties and the subject-matter. That jurisdiction complainant for four years allowed to go unchallenged, and made no move to have the decree disturbed until after her husband's death. The doctrine of laches is a sufficient answer to complainant's cause.

Harovsky v. Chicago City Ry. Co. et al., 205 Ill. App. 570.

The learned chancellor did not err in dismissing the bill for want of equity, and the decree of the Circuit Court is affirmed.

Affirmed.

Josef Harovsky, Appellee, v. Chicago City Railway Company and United States Express Company, on appeal of Chicago City Railway Company, Appellant.

Gen. No. 22,850. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. OSCAR E. HEARD, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed May 28, 1917.

Statement of the Case.

Action for personal injuries by Josef Harovsky, plaintiff, against Chicago City Railway Company and United States Express Company, defendants. From a verdict and judgment against both defendants for \$2,000, defendants appeal separately. For appeal by other defendant, see *post*, p. 571.

WATSON J. FERRY, for appellant; W. W. GURLEY, J. R. GUILLIAMS and B. F. RICHOLSON, of counsel.

DAVID K. TONE and F. A. ROCKHOLD, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. **STREET RAILROADS, § 131***—*when evidence sufficient to show negligence in causing express wagon to strike pedestrian.* In an action against a street railway company and an express company to recover for injuries to plaintiff, received while walking on a sidewalk, through a collision between a street car and an express wagon which caused the wagon to strike plaintiff, evidence examined and held sufficient to support a finding that the street railway company was guilty of negligence.

2. **STREET RAILROADS, § 149***—*when refusal of requested instruction in action for injuries to pedestrian is proper.* In an action against a street railway company and an express company to recover for injuries to plaintiff who, while walking on the sidewalk, was struck by an express wagon which had collided with a street car, it is not error to refuse an instruction which is predicated upon a situation in which a plaintiff finds himself suddenly placed in a position of danger and which undertakes to state a defendant's duty in such a situation.

3. **APPEAL AND ERROR, § 1565***—*when modification of requested instruction not reversible error.* It is not reversible error for the court to make an addition to a requested instruction which renders it less apt to mislead the jury.

Josef Harovsky, Appellee, v. Chicago City Railway Company and United States Express Company, on appeal of United States Express Company, Appellant.

Gen. No. 22,897. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. OSCAR E. HEARD, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed May 28, 1917.

Statement of the Case.

Action for personal injuries by Josef Harovsky, plaintiff, against the Chicago City Railway Company and United States Express Company, defendants.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Harovsky v. Chicago City Ry. Co. et al., 205 Ill. App. 571.

From a verdict and judgment against both defendants for \$2,000, defendants appeal separately. For appeal by other defendant, see *ante*, p. 570.

WINSTON, PAYNE, STRAWN & SHAW, for appellant;
EDWARD W. EVERETT and C. B. FULLERTON, of counsel.

DAVID K. TONE and F. A. ROCKHOLD, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. NEGLIGENCE, § 187*—*when evidence is sufficient to show negligence of express company and lack of contributory negligence of pedestrian struck by wagon.* In an action against a street railway company and an express company to recover for injuries to plaintiff, received while walking on a sidewalk, through a collision between a street car and an express wagon which caused the wagon to strike plaintiff, evidence examined and held sufficient to support a finding that the express company was guilty of negligence and that plaintiff was free from contributory negligence.

2. NEGLIGENCE, § 240*—*when refusal of instruction on test of negligence of driver of express wagon injuring pedestrian is proper.* In an action against a street railway company and an express company to recover for personal injuries to plaintiff, received while he was walking on a sidewalk, through a collision between a street car and an express wagon which caused the wagon to strike plaintiff, it is not error to refuse an instruction making the test of the driver's negligence whether or not he had knowledge that the plaintiff, on the sidewalk, might be injured.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Barbara Borkowsky, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 22,935. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOHN A. MAHONEY, Judge, presiding. Heard in this court at the October term, 1916. Reversed and remanded. Opinion filed May 28, 1917.

Statement of the Case.

Action by Barbara Borkowsky, plaintiff, against the Chicago City Railway Company, defendant, to recover for a breach of contract to transport her property. From a verdict and judgment of \$3,500 for plaintiff, defendant appeals.

WARREN D. BARTHOLOMEW and CHARLES LE ROY BROWN, for appellant; JOHN R. GUILLIAMS, of counsel.

JOHN W. LEEDLE, for appellee; KOCH, LEEDLE & RAPP, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. DAMAGES, § 110*—*when verdict for personal injuries is excessive.* In an action by a passenger for injuries alleged to have been received by the starting of the car, evidence held insufficient to sustain a verdict for \$3,500 for bruises on the head and impairment of vision, alleged to be due to the accident.

2. APPEAL AND ERROR, § 1401*—*when verdict intended to compensate for injuries not causally related to accident will not be sustained.* In an action for personal injuries, the court will not, on appeal, permit a verdict to stand which was manifestly intended to compensate for injuries, the causal relation of which to the accident is not sufficiently shown.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Bortuska v. Chicago Railways Co., 205 Ill. App. 574.

3. DAMAGES, § 188*—*when evidence insufficient to show that impairment of vision was due to accident.* In an action for personal injuries alleged to have been received through the starting of defendant's car as plaintiff was alighting, evidence held insufficient to show that the impairment of vision complained of was due to the accident.

4. APPEAL AND ERROR, § 1474*—*when admission of conjecture and speculation of expert witness is reversible error.* In an action for personal injuries, the admission of conjecture and speculation of a medical witness as to what might produce or cause the condition found by him in plaintiff, is reversible error.

5. EVIDENCE, § 410*—*what opinion of medical witness may not be given.* In an action for personal injuries, it is error to permit a medical witness to testify that plaintiff would eventually become blind, though how long thereafter he could not state, as such an opinion is merely speculative.

6. EVIDENCE, § 368*—*when witness may not testify as to subjective conditions.* In an action for personal injuries it is error to permit a witness to testify as to subjective conditions of plaintiff.

**J. Bortuska, Appellee, v. Chicago Railways Company,
Appellant.**

Gen. No. 22,957. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1916. Reversed with finding of fact. Opinion filed May 28, 1917.

Statement of the Case.

Action by J. Bortuska, plaintiff, against the Chicago Railways Company, defendant, to recover for personal injuries. From a verdict and judgment for plaintiff for \$4,300, defendant appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Doran v. Chicago Railways Co., 205 Ill. App. 575.

FRANK L. KRIETE, for appellant; W. W. GURLEY, J. R. GUILLIAMS and CHARLES L. MAHONY, of counsel.

HAIGHT, BROWN, HAIGHT & HARRIS, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

STREET RAILROADS, § 98*—*when person driving behind street car and upon parallel track is guilty of contributory negligence. One who drives behind a street car at a street intersection upon a parallel track and is struck by a car approaching from the opposite direction on such parallel track is guilty of contributory negligence, where the evidence shows that he saw the car approaching and was also warned by other persons and by signals.*

Catherine Doran, Appellee, v. Chicago Railways Company (Impleaded with Ashland Auto Garage), Appellant.

Gen. No. 22,961. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. WILLIAM FENIMORE COOPER, Judge, presiding. Heard in this court at the October term, 1916. Reversed with finding of fact. Opinion filed May 28, 1917.

Statement of the Case.

Action by Catherine Doran, plaintiff, against the Chicago Railways Company and Ashland Auto Garage, a corporation, defendants, to recover for personal injuries. From a verdict and judgment for plaintiff for \$3,000, defendant Chicago Railways Company appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Atlas v. Chicago Railways Co., 205 Ill. App. 576.

WILLIAM H. SYMMES and FRANK L. KRIETE, for appellant; J. B. GUILLIAMS and ROBERT J. SLATER, of counsel.

JOSEPH P. MAHONEY, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

STREET RAILROADS, § 131*—*when evidence sufficient to show that injury to passenger in automobile colliding with street car was due to negligence of driver.* Evidence in an action to recover for personal injuries received through a collision between a street car and an automobile in which plaintiff was riding as a passenger, examined and held to show that the accident was caused wholly by the negligence of the driver of the automobile.

Edward Atlas, by Samuel Atlas, Appellee, v. Chicago Railways Company, Appellant.

Gen. No. 92,964. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in this court at the October term, 1916. Reversed with finding of fact. Opinion filed May 28, 1917. Rehearing denied June 11, 1917.

Statement of the Case.

Action by Edward Atlas, a minor, by Samuel Atlas, next friend, plaintiff, against the Chicago Railways Company, defendant, to recover for personal injuries. From a verdict and judgment for plaintiff for \$554, defendant appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section numbers.

Francesetti v. Spring Valley Coal Co., 205 Ill. App. 577.

FRANK L. KRIETE, for appellant; J. R. GUILLIAMS and WARREN D. BARTHOLOMEW, of counsel.

HOWARD AMES, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. STREET RAILROADS, § 131*—*when evidence shows no negligence in operation of car striking child.* Evidence in an action to recover for personal injuries to a child struck by a street car in crossing the track, examined and held to show that defendant was guilty of no negligence in the management and operation of its car.

2. STREET RAILROADS, § 66*—*when motorman not negligent in injuring person suddenly appearing on track.* Where a pedestrian unexpectedly appears upon a street car track before an approaching car, it is the motorman's duty to do all that he reasonably can to avoid an accident, and, if he does this, it cannot be said that the accident was caused by negligence on his part.

Anna Francesetti, Appellee, v. Spring Valley Coal Company, Appellant.

Gen. No. 22,863.

1. NEGLIGENCE, § 45*—*when evidence is sufficient to show that coal dump pile and machinery constitutes an attractive nuisance.* In an action against a coal mining company to recover for personal injuries to a child which were alleged to have been caused by an attractive nuisance on its premises, consisting of a dump pile and machinery used in connection with the dump, where the evidence shows that the place where the machinery was operated was open and, to defendant's knowledge, frequented by children; that it could have been protected, in the exercise of reasonable care, so as to exclude accidents without interfering with its practical operation; that defendant knew that, unprotected, the place was one of danger to children who had not attained years of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Francesetti v. Spring Valley Coal Co., 205 Ill. App. 577.

discretion; that when the machinery was in motion it was attractive to children and to the exclusion of other similar places not having operative machinery, the evidence warrants a finding that the pile and machinery constituted an attractive nuisance.

2. NEGLIGENCE, § 194*—*when question for jury whether place is attractive nuisance.* In an action to recover for injuries to a child alleged to have been caused by an attractive nuisance, the question whether the place of the accident was an attractive nuisance is for the jury.

3. NEGLIGENCE, § 45*—*when evidence sufficient to show that place constituting attractive nuisance could have been protected.* In an action to recover for injuries to a child alleged to have been caused by an attractive nuisance, evidence held to support a finding that the place of the accident might have been readily protected, by the exercise of reasonable care, so as to exclude accidents and not to warrant a finding that leaving the place unguarded and unprotected was the only practical method of operation.

Appeal from the Superior Court of Cook county; the Hon. M. L. MCKINLEY, Judge, presiding. Heard in this court at the October term, 1916. Affirmed. Opinion filed May 28, 1917.

MASTIN & SHERLOCK, for appellant; FRANK CROZIER, of counsel.

GEORGE E. GORMAN and POLLOCK, RAINEY & LIVINGSTON, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Plaintiff, in an action for personal injuries, obtained a verdict for \$15,000 and a judgment thereon against defendant, from which defendant appeals.

It is averred in the declaration that plaintiff lost her left arm a few inches below the shoulder, on the premises of defendant in the Village of Dalzell, Bureau county, Illinois. It is said that plaintiff was a trespasser upon the property of defendant when injured, unless it can be held as a matter of law that the occurrence falls within the doctrine of attractive nuisances.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

It seems that at the time of the accident, August 6, 1907, plaintiff was a little girl living in the Village of Dalzell near the coal mine of defendant; that defendant conducted coal mining operations and owned a tract of land near the Village of Dalzell on which it prosecuted that business. The declaration avers, *inter alia*, that defendant had a certain overhead trolley with cars attached thereto, which were operated along the overhead trolley by means of a revolving rope, pulleys and sprocket wheels, as a means of carrying rock and waste to the dumping ground; that these were so arranged that cars attached to the trolley were moved from the mine opening up an incline to the dumping ground, where the cars were dumped and returned down the incline; that this place was located in proximity to a public highway, where numerous children were accustomed to pass in going to and returning from school; that there was a certain path from the highway to the mines which was used by children in reaching that part of defendant's premises where the machinery was located; that such children were in the habit of going on the premises, which were uninclosed, for the purpose of amusement, to watch the conveyor while in motion, and to play on the refuse pile, which was attractive to children on account of the natural desire to run up and down an artificial hill thus created, slide and play thereon, and because the continued movement of the conveyor was attractive to children by reason of their love of motion other than their own locomotion. It is then averred that defendant in the exercise of reasonable care and prudence would have known that the artificial hill, cars, sprocket wheels, ropes, and other appliances used on the conveyor, the conveyor when in operation, and the dumping ground itself, were attractive to children, and that children were in the habit of going to the premises to play about the same; that because

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of such attractions there existed an implied invitation to children to come upon the land of defendant and play thereon, and that by reason thereof the premises were a dangerous and attractive nuisance to children. It is then averred that plaintiff went upon the premises to play upon the rock pile and to pick up coal; that it was defendant's duty to exercise reasonable care in the operation of its conveyor to see that the same was reasonably safe for persons about it, or provide reasonably safe means to warn or protect children from such dangers; that defendant neglected its duty in this regard and permitted the wheels, etc., to remain unguarded and unprotected, and failed to use any reasonably safe means to warn or protect children, by reason whereof plaintiff's clothing, while she was in the exercise of reasonable care for her own safety and while she was standing on the rock pile near the rope, caught in the conveyor so that she was drawn up to and against a certain wheel, mangling her arm, etc.

The sole question here for determination is, does the case fall within the doctrine of attractive nuisances, and defendant, in denial that it does, contends that the declaration states no cause of action; that the instructed verdict requested by defendant should have been granted, and that the verdict was contrary to the manifest weight of the evidence; and it being conceded that the facts of the occurrence are not in serious dispute, the whole question involved becomes primarily one of law.

It appears that the machinery of defendant attracted children to it; that there was adjoining the property of defendant another coal mining property similarly situated, but which lacked the attraction of machinery, and the evidence fairly shows that the children did not resort to the property where there was no machinery, but to the property of defendant where the machinery was in operation; and it may be

argued therefrom that this was the lure to the children which constituted an attractive nuisance.

It is further urged that plaintiff's injuries did not flow from any trouble with the machinery, but that it was the wind which blew her clothing into the machinery which was the cause of the accident, and that there was nothing about that machinery with which children could play.

We think the evidence fairly establishes that defendant knew that children played in the vicinity of the revolving machinery, and therefrom it had notice of the dangers to which such children were exposed, and that it took no means to prevent accidents befalling such children. It is quite true that unless defendant can be condemned under the doctrine of attractive nuisance, then it owed no duty in the premises whatever.

The doctrine of attractive nuisance as expounded by our own Supreme Court is the law of this forum, notwithstanding decisions in conflict therewith may be encountered in other jurisdictions. We do not think the doctrine of attractive nuisance as defined in the so-called "turntable" cases need be extended to any greater lengths than pronounced in such decisions, but if the principle of these decisions is applicable by analogy to the facts of the instant case, then such case falls within the principle and the doctrine. Defendant contends that the doctrine of the so-called "turntable" cases is as announced in *City of Pekin v. McMahon*, 154 Ill. 141, in these words:

"In many, if not in all of the foregoing 'turntable' cases, stress is laid upon the facts that the turntable was in a public or open and frequented place; that it was dangerous and left unfastened, and when in motion (i. e., put in motion by children) was attractive to children by reason of their love of motion 'by other means than their own locomotion'; and that the servants of the railroad companies knew, or had reason

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to believe, that it was attractive to children, and that children were in the habit of playing on or about it. The doctrine of the cases is that the child cannot be regarded as a voluntary trespasser, because he is induced to go upon the turntable by the defendant's own conduct."

Every essential of this quotation could be suitably paraphrased to fit the case before us. The place where the machinery was operating was in an open, frequented place, a place frequented, to the knowledge of defendant, by the children of the village; defendant also knew that, unprotected, the place was one of danger to children who had not attained years of discretion; that when the machinery was in motion it was attractive to children, and in fact attracted the village children to the exclusion of all the other slack, rock and dump piles in the vicinity lacking operative machinery. *Rost v. Parker Washington Co.*, 176 Ill. App. 245.

We think the evidence clearly justifies the conclusion that the machinery and the rock pile combined were in fact an attractive nuisance within the reasoning of all the cases in this jurisdiction defining an attractive nuisance. Whether the place of the accident to plaintiff was an attractive nuisance was for the determination of the jury as a question of fact, and we think they might reasonably find from the evidence in the record that it was. *Siddall v. Jansen*, 168 Ill. 43. And they might further find, as we assume they did, that the place of danger might, by the exercise of reasonable care, have been readily protected so as to exclude accidents; and from the proofs we hardly think the jury could have fairly said that leaving the place unguarded and unprotected was the only practical method which could have been pursued in operating the machinery.

The declaration stated a cause of action, the evidence in the record proves the essentials of the negli-

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gence charged, and that record being otherwise without error in procedure, the judgment of the Superior Court is affirmed.

Affirmed.

**Emma Victoria Ehrenstrom, Administratrix, Appellee,
v. Chicago City Railway Company, Appellant.**

Gen. No. 22,953. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. M. L. MCKINLEY, Judge, presiding. Heard in this court at the October term, 1916. Reversed with finding of fact. Opinion filed May 28, 1917. Rehearing denied June 11, 1917.

Statement of the Case.

Action by Emma Victoria Ehrenstrom, administratrix of the estate of Frank Ehrenstrom, deceased, plaintiff, against the Chicago City Railway Company, defendant, to recover for negligently causing the death of plaintiff's intestate. From a verdict and judgment for plaintiff for \$8,000, defendant appeals.

JOHN E. KEHOE and CHARLES LE ROY BROWN, for appellant; JOHN R. GUILLIAMS, of counsel.

WILLIAM J. PRINGLE and EDWIN TERWILLIGER, JR., for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. STREET RAILROADS, § 97*—when person crossing track in front of car is guilty of contributory negligence. In an action to recover

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Malm et al. v. Schwimmer, 205 Ill. App. 584.

for the death of one struck by a street car in crossing the track, the evidence showed that plaintiff's intestate, while looking in another direction, stepped on the track when the car was six or eight feet away and approaching at a good rate of speed, and that its gong was sounding and it was lighted and its headlight was burning. It did not appear that he looked for the car or that his view of it was obstructed, but it did appear that, if he had looked, he must have seen it. The evidence further showed that the speed of the car was not excessive and plaintiff admitted that defendant used all efforts to avoid the injury after the peril was discovered. *Held*, that plaintiff's intestate was not in the exercise of ordinary care, but was guilty of such contributory negligence as to preclude a recovery.

2. APPEAL AND ERROR, § 1810*—*when case reversed with finding of fact*. The power of the Appellate Court to reverse a judgment of the trial court with a finding of fact is not confined to cases in which the latter might properly direct a verdict.

**C. E. Malm and L. M. Malm, Defendants in Error, v.
Harry I. Schwimmer, Plaintiff in Error.**

Gen. No. 21,766. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded. Opinion filed May 29, 1917.

Statement of the Case.

Action by C. E. Malm and L. M. Malm, plaintiffs, against Harry I. Schwimmer, defendant, on a lease. There was a judgment by confession whereupon defendant moved to set it aside and for permission to appear and defend on the merits. To reverse an order denying this motion, defendant prosecutes this writ of error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Held v. Bankers Insurance Corporation, 205 Ill. App. 585.

WILLIAM GILLESPIE, for plaintiff in error.

No appearance for defendants in error.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

LANDLORD AND TENANT, § 330*—*when affidavit of defense in support of motion to set aside judgment by confession on lease is sufficient.* Where the purport of the facts set forth in an affidavit in support of a motion to set aside a judgment entered by confession on a lease and to be permitted to appear and defend on the merits is that the parties intended that the lease should not take effect on its delivery, but that the delivery was conditional upon the doing of something by the lessors before it should take effect, such affidavit tends to show a good defense which the court should have permitted defendant to present.

Mary Held, Appellee, v. Bankers Insurance Corporation, Appellant.

Gen. No. 22,320. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. RUFUS F. ROBINSON, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and remanded. Opinion filed May 29, 1917. Rehearing denied June 7, 1917.

Statement of the Case.

Action by Mary Held, plaintiff, against the Bankers Insurance Corporation, defendant, to recover on a benefit certificate issued by a Nebraska society, the business of which was "taken over" by an insurance

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Held v. Bankers Insurance Corporation, 205 Ill. App. 585.

corporation which was thereafter consolidated with defendant. Defendant having averred a tender of \$994.94 and plaintiff's refusal to accept it in full satisfaction of her claim, the court entered judgment for that sum and costs, which was refused as full satisfaction of claim and the cause having proceeded to trial upon the issues raised by the additional averments of the affidavit of merits, the court directed a verdict for plaintiff for \$2,164.16, and from the judgment entered thereon, defendant appeals.

ALBERT J. W. APPELL, for appellant.

ROBERT J. FOLONIE, for appellee.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1303*—*when not assumed that sufficient evidence was heard to support directed verdict.* On appeal from a directed verdict for plaintiff in an action to recover on a benefit certificate of another insurance society, the liability under which was alleged to have been assumed by defendant insurance society, the rule that the Appellate Court will assume that sufficient evidence was heard to support the verdict, where the court's certificate to the bill of exceptions does not state that it contains all of the evidence, does not control where the record contains some evidence tending to support one of the defenses, and the evidence in support of plaintiff's claim of assumption of liability by the defendant is too meager to enable the Appellate Court to find that the alleged assumption was not in excess of defendant's powers or that a new application and examination of defendant could be dispensed with.

2. INSURANCE, § 898*—*when evidence is insufficient to show assumption of benefit certificate by another company.* In an action on a benefit certificate, where defendant's liability is predicated upon its assumption of the certificate, and the principal reliance of plaintiff to support such contention is the acceptance by defendant of dues and assessments from the insured and the claim that the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Bottigliero et al. v. Zeidman et al., 205 Ill. App. 587.

defendant had "consolidated" with another insurance company which had "taken over" the business of the insurer which issued the certificate, but no showing as to the arrangement or method of such alleged assumption is made, there is not sufficient evidence to establish it.

3. INSURANCE—*when reinsurance contract is ultra vires*. A reinsurance contract, whereby one fraternal beneficiary society undertakes to assume and agrees to pay the benefits stipulated in the certificate of another, is *ultra vires* and not enforceable.

**Michael Bottigliero and Mary Bottigliero, Appellees, v.
Morris Zeidman and Minnie Zeidman, Appellants.**

Gen. No. 22,337. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed May 29, 1917. Rehearing denied June 8, 1917.

Statement of the Case.

Bill by Michael Bottigliero and Mary Bottigliero, complainants, against Morris Zeidman and Minnie Zeidman, defendants, for the reformation of a written contract for the exchange of land, for damages for failure of defendants to perform after complainants' tender of performance and for cancellation of a note given to secure performance. Defendants filed a cross-bill alleging a breach of contract by complainants and an offer and readiness for performance on their part and, except as to the claim for reformation of the contract, sought the same relief as that sought by complainants. The decree found that there was mutual mistake in designating the street number of the property and that complainants suffered damages from

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the breach of contract to the amount of \$787.50, exclusive of solicitors' fees and expenses of the suit, and ordered the cancellation of the judgment note for \$1,000 signed by complainants, and that the judgment note for the same amount signed by defendants and given to secure performance should be surrendered on the payment of the damages. From such decree, defendants appeal.

SAMUEL B. HILL, for appellants.

THOMAS B. LANTRY, for appellees.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 389*—*when objection that complainant has an adequate remedy at law deemed waived on appeal.* On a bill for reformation of a contract for the exchange of land, for damages for failure to perform and for the cancellation of a note given to secure performance, where defendants, by cross-bill, seek the same relief, except the reformation of the contract, and make no objection to complainants' right to equitable relief in the lower court, they will be deemed to have waived a contention, first raised on appeal, that complainants had an adequate remedy at law.

2. EQUITY, § 23*—*when jurisdiction retained on bill for reformation of contract to exchange land.* Where, on a bill for reformation of a contract for the exchange of land, defendants concede that a reformation on the ground of mutual mistake is a matter of equitable jurisdiction and the court properly finds that there was such mistake, the court may properly retain jurisdiction for all purposes including the assessment of damages.

3. REFORMATION OF INSTRUMENTS—*mutual mistake as question for court.* On a bill for the reformation of a contract for the exchange of land on the ground of mutual mistake, it is for the court to determine whether or not there was such mistake.

4. APPEAL AND ERROR, § 1394*—*when findings in equity case not disturbed.* On appeal from a decree on a bill for the reformation of a contract for the exchange of land, the decree will not be dis-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

turbed on the ground of the insufficiency of the evidence to warrant the findings unless the findings of fact are clearly and palpably wrong.

5. APPEAL AND ERROR, § 1301*—*when presumed that evidence was sufficient to support findings in decree.* On appeal from a decree where it is stated in the court's certificate that all of the evidence heard was not preserved, it will be presumed that there was sufficient evidence to support the specific findings of fact recited in the decree, and points based on hypotheses of fact different from the chancellor's findings will not be considered.

6. APPEAL AND ERROR, § 1236*—*when defendants estopped to raise question of insufficiency of proof relating to uncontested allegations in bill.* Where, on the hearing on a bill, counsel for defendants expressly admit all save one of its allegations and the court directs that the evidence be confined to that issue, there is no necessity of proving the other allegations, and, on appeal, defendants are estopped to raise the question of the insufficiency of the proof relating to the uncontested allegations.

7. APPEAL AND ERROR, § 438*—*when claim of variance not considered.* A claim of variance first urged in a petition for rehearing and not during the trial will not be considered on appeal.

8. APPEAL AND ERROR, § 726*—*when finding of fact in decree cannot be impeached.* On appeal, findings of fact in the decree cannot be impeached unless all of the evidence heard on the trial is preserved in the record.

9. APPEAL AND ERROR, § 1236*—*when counsel for appellants precluded from urging that allowance of solicitors' fees was erroneous.* Where the record on appeal from a decree shows that counsel for appellants expressly stated that he had no objection to a draft of the decree which included the allowance of solicitors' fees, appellants cannot urge such allowance as error.

10. EXCHANGE OF PROPERTY, § 9*—*what is measure of damages for breach of contract for.* On a bill for the reformation of a contract for the exchange of land and for damages for failure to perform, the measure of damages is the difference between the agreed price of the properties and their market value at the time of the breach.

11. COSTS, § 73*—*when cost of additional abstract taxed against appellants.* On appeal, where appellants do not submit a sufficiently full and fair abstract for a proper consideration of the points urged and the additional abstract is unnecessarily full, a part thereof will be taxed against appellants as additional costs.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Sullivan v. A. H. Andrews Co., 205 Ill. App. 590.

Joseph J. Sullivan, Appellee, v. A. H. Andrews Company, Appellant.

Gen. No. 22,361. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. HENRY B. EATON, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and remanded. Opinion filed May 29, 1917.

Statement of the Case.

Action by Joseph J. Sullivan, plaintiff, against the A. H. Andrews Company, a corporation, defendant, to recover a commission on the sale of theater chairs under an oral contract. Plaintiff claimed that he was to have any excess over the catalogue price, and defendant that the sale was "f. o. b." the factory and that the price was to be net to it and did not include the cost of installing the chairs. - From a judgment for plaintiff, defendant appeals.

GREGORY & McNAB, for appellant; ALBERT S. LONG, of counsel.

JOHN C. TRAINOR, for appellee.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 66*—*when burden of proving contract for commissions is on plaintiff.* In an action to recover commissions on the sale of goods under an oral contract, the burden of proving the contract under which he claims is on plaintiff.

2. EVIDENCE, § 475*—*what does not constitute preponderance of.* In an action to recover commissions under an oral contract where

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Miller v. Lerner, 205 Ill. App. 591.

the only persons having knowledge of the terms of the contract are plaintiff and defendant's agent, with whom it is claimed to have been made, and their evidence conflicts, *held* that a meeting of minds as to the terms and the preponderance of the evidence in plaintiff's favor were doubtful.

3. **APPEAL AND ERROR, § 1772***—*when case reversed because of conduct of counsel.* In an action to recover on an oral contract in which the evidence as to the meeting of the minds is doubtful, and there is a direct conflict of evidence between the only persons having knowledge of the terms of contract, a judgment for plaintiff will be reversed where his counsel persistently endeavored, in the face of adverse rulings by the court, to bring prejudicial matter before the jury, both in his examination of the witnesses and in his argument to the jury.

Minnie Miller, Defendant in Error, v. I. Lerner, Plaintiff in Error.

Gen. No. 22,369. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN COURTNEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1916. Affirmed. Opinion filed May 29, 1917.

Statement of the Case.

Action by Minnie Miller, plaintiff, against I. Lerner, defendant, to recover rent under a lease. To reverse a judgment for plaintiff, defendant prosecutes a writ of error.

ALBERT MARTIN, for plaintiff in error; MELVILLE B. ADAMS, of counsel.

No appearance for defendant in error.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ryan v. Chicago City Railway Co., 205 Ill. App. 592.

Abstract of the Decision.

LANDLORD AND TENANT, § 93*—*when tenant accepting unsigned written lease may not claim that tenancy is from month to month.* Where there is an arrangement between a landlord and a tenant in possession of the premises that the latter will rent the premises under a written lease for a year from a certain date at a specified rental and he remains in possession after the commencement of the term, paying the rent agreed upon in the new lease without objecting to its terms, such tenant cannot claim that the lease was from month to month, although the written lease was not signed by him.

George Ryan, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 22,878. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTTILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and remanded. Opinion filed May 29, 1917.

Statement of the Case.

Action by George Ryan, plaintiff, against the Chicago City Railway Company, defendant, to recover for injuries sustained by a collision with defendant's street car while driving across its track at a street intersection. From judgment for plaintiff on a verdict for \$3,000, defendant appeals.

BUSBY, WEBER & MILLER, B. F. RICHOLSON and ARTHUR J. DONOVAN, for appellant; JOHN R. GUILLIAMS, of counsel.

THURMAN, HUME & KENNEDY, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. DAMAGES, § 115*—*when verdict for temporary injuries is excessive.* In an action for personal injuries, where the only injuries shown are a broken tooth, superficial cuts and bruises which healed in about two weeks, two of them requiring one stitch each, and an injury to the nose, the exact nature and duration of which was not shown, a verdict for \$3,000 is excessive.

2. DAMAGES, § 206*—*when instruction is erroneous as not being based upon evidence.* In an action for personal injuries, the declaration in which alleged that by reason of the injuries plaintiff had been prevented from performing his usual work and business and in the future would be unfit and unable to perform it, and that he had paid and become liable to pay large sums for medical attention, nursing, care and medicine, it is error to instruct the jury that they may consider, in estimating plaintiff's damages, "the effect, if any, shown by the evidence of the injury upon the plaintiff's * * * ability to labor," and that "in the assessment the jury must take into consideration only such elements of damage as have been alleged in the declaration, and which have been established by a preponderance of the evidence," where there was no evidence as to his earning capacity or wages nor as to his medical and hospital expenses, but merely that he was confined to the hospital for a time, had medical attention, and tending to show that he was out of work at least six or eight weeks.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Roberts v. Chicago City Railway Co., 205 Ill. App. 594.

Mary Roberts, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 22,387. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTTILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed on remittitur. Opinion filed May 29, 1917.

Statement of the Case.

Action by Mary Roberts, plaintiff, against the Chicago City Railway Company, defendant, to recover for personal injuries alleged to have been received through having been thrown from defendant's street car while a passenger thereon. From a verdict and judgment for \$2,000 for plaintiff, defendant appeals.

FRANKLIN B. HUSSEY and WATSON J. FERRY, for appellant; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

LONGENECKER & HEISE, for appellee.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. INSTRUCTIONS, § 25*—*when not error to refuse to direct jury to disregard faulty counts.* Where the declaration in an action for personal injuries consists of four counts, it is not error to refuse to direct the jury to disregard three of the counts, even though the evidence did not tend to sustain them, if it sustained the remaining count.

2. CARRIERS, § 480*—*when question as to excessive speed of cars for jury.* In an action to recover for personal injuries through

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Anderson v. Anderson, 205 Ill. App. 595.

being thrown from a moving street car, the question as to whether the speed of the car at the time of the accident was excessive is for the jury, where the evidence in regard thereto is conflicting.

3. CARRIERS, § 480*—*when question as to due care of passenger is for jury.* In an action for personal injuries through being thrown from a moving street car, the question as to whether plaintiff was exercising due care is for the jury, where the evidence in regard thereto is conflicting.

4. DAMAGES, § 114*—*when verdict for personal injuries is excessive.* In an action for personal injuries, where the physical injuries testified to consisted mainly of bruises on various parts of the body without any breaking of bones, a cut over the eye requiring six stitches, one on the chin requiring one stitch, an injury to the right arm and right knee, a broken tooth, pains in various parts of the body, a threatened abortion, which was, however, successfully averted, and scars, not described as serious, and plaintiff was confined to her bed and under medical attention for about five or six weeks, and the evidence further tends to show that plaintiff attempted to enhance her damages in her testimony as to the value and loss of her services, judgment on a verdict for plaintiff for \$2,000 will not be affirmed save on a remittitur of \$500.

Edna Anderson, Appellee, v. E. Stanton Anderson,
Appellant.

Gen. No. 22,399. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. GEORGE KERSTEN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1917. Reversed. Opinion filed May 29, 1917.

Statement of the Case.

Bill for divorce by Edna Anderson, complainant, against E. Stanton Anderson, defendant. From an order committing defendant for contempt of court for refusal to pay \$1,075 alimony entered therein, defendant appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Anderson v. Anderson, 205 Ill. App. 595.

LESLIE H. WHIPP, for appellant.

LLOYD D. HETH, for appellee.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

DIVORCE, § 122*—*when order committing defendant for contempt of court for refusal to pay alimony will be reversed.* Even though the record on appeal from an order committing a defendant for contempt of court in refusing to pay alimony fails to show that there was any petition or affidavit to support the rule to show cause and the failure to appear, in conformity with the usual practice, such irregularities are not ground for reversal if defendant was given an opportunity to appear and purge himself and evidence was heard to support the findings recited in the order of commitment, but where the record shows nothing whereon to predicate the order save the rule, the appearance and an undisposed of motion to quash the same, and further shows that defendant was discharged on his answer to another rule a few days before which set up facts tending to show that no alimony was due at that time, judgment on an order of commitment for the nonpayment of \$1,075 will be reversed, where the decree allowed only \$100 a month.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Richard J. Cooney, Appellee, v. Robert M. Sweitzer,
County Clerk of Cook County.****Gen. No. 22,416.**

1. **PARTIES, § 35***—*when word "as" should be used where person is party in representative capacity.* Ordinarily the proper pleading requires that when one is made a party in a representative capacity, the word "as" shall be used to connect his name with the term descriptive of such capacity.

2. **PARTIES, § 35***—*what description of party suing in representative capacity is sufficient.* The character in which a party sues or is sued must be determined from the body of the pleading, and a substantial description is sufficient.

3. **PARTIES, § 35***—*when petition of mandamus shows that relation of defendant to suit is in representative capacity.* A petition for a writ of mandamus to compel S., "County Clerk of Cook County, Illinois," to permit petitioner to inspect certain books described therein, which alleges that defendant is county clerk of such county; that by statute he has the care and custody of the county books and records in his office and that they shall be open to the inspection of all persons; that petitioner has requested permission to inspect certain of such records and defendant has refused; and which prays that a writ of mandamus be directed to said defendant S., "County Clerk of Cook County, Illinois," commanding him forthwith to permit petitioner to inspect said books, sufficiently shows that the only relation of defendant to the suit is in his representative capacity, and it is not necessary to show that he is not sued in his individual capacity.

4. **JUDGMENT, § 397***—*when judgment read in light of pleadings and other parts of record.* Where a judgment appears ambiguous in its form as to the capacity of a party to it, it will be read in the light of the pleadings and other parts of the record.

5. **MANDAMUS, § 172***—*when judgment binds defendant in representative capacity.* A judgment awarding a peremptory writ of mandamus commanding one S., "County Clerk of Cook County, Illinois," to permit petitioner to inspect certain books, held sufficiently clear, when read in the light of the pleadings and other parts of the record, to bind defendant in his representative capacity.

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed May 29, 1917.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MAYER, MEYER, AUSTRIAN & PLATT, for appellant.

HARRY J. STANDIDGE, JOHN A. VERHOEVEN and
THOMAS E. SWANSON, for appellee.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

This is an appeal from a judgment awarding a peremptory writ of mandamus commanding "Robert M. Sweitzer, County Clerk of Cook County, Illinois," to permit the petitioner, appellee, to inspect certain books described in the petition for the writ. Appellant demurred generally and specially, and elected to abide by his demurrer on its being overruled, and contends in the main that the words "County Clerk" following the name Robert M. Sweitzer, both in the petition and the judgment, are merely *descriptio personæ*, and, without the connective "as" preceding them, are ineffectual to make him a defendant in his official capacity to such cause of action.

From the averments of the petition it is manifest that it seeks the enforcement of an official duty against respondent in his capacity as county clerk. It alleges that he is the county clerk of Cook county; that by statute the county clerk has the care and custody of the county books and records in his office and that they shall be open to the inspection of all persons; that petitioner requested permission of defendant to inspect certain of said records, etc., of which, under the law, he has the care and custody, and that defendant refused to comply with such request. After setting forth other matters immaterial to the question involved here, the petition prays for the issuance of a writ of mandamus directed "to the said defendant, Robert M. Sweitzer, County Clerk of Cook County, Illinois, commanding him" forthwith to permit the petitioner to inspect said books, etc.

Unquestionably good pleading generally requires that when one is made a party in a representative capacity the word "as" should be used to connect his name with the term descriptive of his representative character. It is a rule which makes for certainty, and is especially applicable "where a party occupies two relations to the subject-matter." (*Kinsella v. Cahn*, 185 Ill. 208.) But the character in which a party sues or is sued must be determined from the body of the pleading, and a substantial description is sufficient. (31 Cyc. 99; *Kinsella v. Cahn*, *supra*.) It is apparent from the averments in the petition that this cause of action could be brought against respondent only in his official capacity. In the *Kinsella* case, *supra*, the complainants were described as "Ida Cahn and Simon Strauss, trustee under the trust deed," etc. The court said that as Strauss had no relation to the suit except as trustee there was no necessity for showing that he did not file the bill in some other relation or by some other right. And so here. As from the nature of the cause of action and averments in the petition it is clear that Sweitzer had no relation to the suit except as county clerk, no necessity existed for showing that he was not sued in his individual capacity.

In most of the cases where, in the absence of the connective "as," descriptive words have been treated merely as *descriptio personæ*, the cause of action or averments were such that the party to whom such words applied might occupy two different relations with reference to the subject-matter of the suit. But where that is not the case, as in the suit at bar, the reason for the rule which rejects such words as surplusage in the absence of the connective "as" does not obtain.

We have carefully examined the authorities cited by appellant where the descriptive words were rejected as surplusage, thus rendering the action one for or against a party personally, and without undertaking to

E. L. Essley Mch. Co. v. Dann Oil C. S. I. Co., 205 Ill. App. 600.

analyze them in this opinion think that they may be readily distinguished in principle or fact from the case at bar, and many of them on the ground of ambiguity in the pleading as to the capacity in which the party sued or was sued. The petition before us is not ambiguous. We think the demurrer was properly overruled.

We think too that the judgment is binding on appellant in his representative capacity. A judgment, to be sure, should be certain and definite or capable of being made so by proper construction. To that end it will be read in the light of the pleadings and other parts of the record if in its form it appears to be ambiguous as to the capacity of a party to it. (*Gibbs v. Fuller*, 66 N. C. 116; *Commonwealth v. Ford*, 29 Grat. [Va.] 683.) We find no reversible error in the record.

Affirmed.

E. L. Essley Machinery Company, Appellee, v. Dann Oil Cushion Spring Insert Company, Appellant.

Gen. No. 22,418. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. SAMUEL H. TRUDE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed with finding of fact. Opinion filed May 29, 1917.

Statement of the Case.

Action by E. L. Essley Machinery Company, a corporation, plaintiff, against the Dann Oil Cushion Spring Insert Company, a corporation, defendant, on a *quantum meruit*, for merchandise sold and delivered. From a finding and judgment for plaintiff, defendant appeals,

E. L. Essley Mch. Co. v. Dann Oil C. S. I. Co., 205 Ill. App. 600.

FREDERIC R. DE YOUNG, for appellant.

HARRY A. BIOSSAT, for appellee.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 1173***—*what is subject of review where no propositions of law are submitted or rulings on law involved.* On appeal from a judgment in a case tried by the court without a jury, where no propositions were submitted to be held as the law of the case and there were no rulings involving any controlling question of law, the only question for review is whether or not the findings and judgment of the court are contrary to the evidence.

2. **ASSUMPSIT, ACTION ON, § 89***—*when evidence sufficient to sustain judgment on quantum meruit for goods sold and delivered.* In an action on a *quantum meruit* for merchandise sold and delivered, evidence examined and held insufficient to support a finding and judgment for plaintiff.

3. **SALES, § 276***—*when machinery may be returned at any time within time limited.* Where machinery is sold under a contract which provides for payment in sixty days and guarantees that it will work satisfactorily for one year and that, in case it is unsatisfactory, it may be returned at any time within the year, the purchaser may return it at any time within such stipulated period.

4. **SALES**—*when seller may not abandon contract although goods not paid for within time limit.* The fact that machinery, which is sold under a contract providing for payment in sixty days and with the privilege of returning it at any time within a year if it is unsatisfactory, is not paid for in sixty days, does not entitle the seller to abandon the contract and sue on a *quantum meruit*, where the evidence shows that the machinery was unsatisfactory and the seller, within the year, agreed to come and get it.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Bosley Brothers v. Lawndale Iron & Wire Works, 205 Ill. App. 602.

Bosley Brothers, Appellee, v. Lawndale Iron & Wire Works, Appellant.

Gen. No. 22,457. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. THOMAS TAYLOR, JR., Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed May 29, 1917.

Statement of the Case.

Action on a note by Bosley Brothers, a corporation, plaintiff, against the Lawndale Iron & Wire Works, a corporation, defendant. From a judgment for plaintiff for four hundred dollars, defendant appeals.

PADORR & ROSENBLATT, for appellant.

SONNENSCHN, BERKSON & FISHELL, for appellee.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1173*—*what questions of law not reviewable where no propositions of law are submitted.* Where a case was tried by the court without a jury and no propositions of law were submitted, questions of law not arising on rulings on the evidence are not reviewable.

2. APPEAL AND ERROR, § 1414*—*when finding of trial court not disturbed.* In an action on a note, where the evidence whether certain other notes were delivered as payment of the note in suit or as collateral security therefor is conflicting, the trial court's finding thereon will not be disturbed.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Florence M. Ensminger, Appellee, v. Chicago Railways Company, Appellant.**Gen. No. 22,462. (Not to be reported in full.)**

Appeal from the Circuit Court of Cook county; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed May 29, 1917. Rehearing denied June 8, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Florence M. Ensminger, plaintiff, against the Chicago Railways Company, defendant, to recover for personal injuries. From a judgment for plaintiff on a verdict for \$2,200, defendant appeals.

CHARLES L. MAHONY and FRANK L. KRIETE, for appellant; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

FREDERICK Z. MARX, for appellee.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. CARRIERS, § 476*—*when evidence sufficient to show starting of car before passenger alights.* In an action for personal injuries alleged to have been received by falling in alighting from a street car, where the evidence is conflicting whether the car, after stopping for plaintiff to alight, started before she did so, the finding of the jury thereon in plaintiff's favor will not be disturbed.

2. CARRIERS, § 476*—*when evidence is sufficient to show that fall of alighting passenger was caused by catching dress in door.* In an action for personal injuries alleged to have been received by falling in alighting from a street car which had stopped to permit plaintiff to alight, but started before she did so and while her dress was caught in the car door, where the evidence is conflicting as to whether the fall was caused by the catching of her dress in the car door or by the condition of the street, the finding of the jury thereon in plaintiff's favor will not be disturbed.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ensminger v. Chicago Railways Co., 205 Ill. App. 603.

3. DAMAGES, § 120*—*when verdict for personal injuries is not excessive.* In an action for personal injuries, where plaintiff's evidence shows that her left shoulder was dislocated, the ligaments of the shoulder blade and arm were torn, that she suffered nervousness, constant pain and loss of sleep and was unable to lie in bed on her injured arm or to lift it or extend it as before the accident, and the only evidence in contradiction thereof was that of a physician as to the usual consequences of such a dislocation, a verdict for \$2,200 is not excessive.

4. APPEAL AND ERROR, § 1637*—*when error in instruction is cured by other instructions.* Even though an instruction is subject to the objection that it is abstract in form, it is not ground for reversal, where other specific instructions are given in connection therewith which correct any tendency to mislead.

5. APPEAL AND ERROR, § 1523*—*when giving of instruction not in conformity with issues is harmless error.* Even though an instruction injects into the case an issue which, if the jury took the defendant's view, was not involved, the giving of such instruction is not ground for reversal where it could not have harmed defendant.

6. CARRIERS, § 479*—*when instruction in action by street car passenger for personal injuries is not reversibly erroneous because directing a verdict.* In an action for personal injuries alleged to have been caused by defendant's negligence in starting its car while plaintiff was alighting, an instruction to the jury that "if from a preponderance of all the evidence, and under the instructions of the court you find the defendant guilty as charged in the declaration, then you should assess the damages herein," is not reversible error on the ground that it directs a verdict for plaintiff regardless of whether she exercised ordinary care for her own safety, where, by other instructions, the jury were told under what conditions of fact defendant could not be found guilty and that the exercise of ordinary care on plaintiff's part was essential to her recovery, even though defendant was negligent.

7. DAMAGES, § 244*—*when instruction not in conformity with pleadings not reversibly erroneous.* In an action for personal injuries, the giving of an instruction that the jury might, in computing damages, take into consideration any permanent disability of plaintiff and her inability to work, is not reversible error, even though the declaration did not allege permanent injury or inability to work beyond a period of six weeks, where evidence was introduced of permanent disability and inability to do the same kind of work after the accident as before it, without the question of variance being raised by defendant, as the defect in this respect in the declaration was cured by the verdict.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Marmon Chicago Company, Plaintiff in Error, v. C. E. Heath et al., Defendants in Error.

Gen. No. 22,652. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1916. Affirmed. Opinion filed May 29, 1917.

Statement of the Case.

Action by the Marmon Chicago Company, a corporation, plaintiff, against C. E. Heath, J. S. Follett, G. Heath, A. D. Whatman, A. Burns and M. Evans, defendants, to recover on a fire insurance policy on an automobile issued to plaintiff and another. To reverse a judgment for defendants, plaintiff prosecutes this writ of error.

WILLIAM A. JENNINGS, for plaintiff in error.

JOHN A. BLOOMINGTON, for defendants in error.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. **INSURANCE**—*when use of automobile by mortgagor avoids policy.* Where a policy of fire insurance on an automobile, issued to plaintiff and one who bought the automobile from plaintiff and gave back a mortgage for part of the purchase price, provides that the automobile shall not be used for renting purposes or for hire, and the evidence shows that such car was used mainly, if not entirely, for livery purposes and uses by such mortgagor, there can be no recovery under the policy.

2. **INSURANCE, § 120***—*what are limits of rule of as to liberal construction of policy in favor of insured.* The rule that an insurance policy is to be liberally construed in favor of the insured is not carried to the extent of construing the policy contrary to its manifest intent and express condition.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lilikis v. Bossi et al., 205 Ill. App. 606.

3. **INSURANCE**—*when provision in policy restricting use of automobile applies to both mortgagor and mortgagee.* The condition in a policy of fire insurance issued on an automobile to the mortgagee and mortgagor of the car, as their respective interests might appear, that the car shall not be used for renting purposes or for hire, applies to both the mortgagor and the mortgagee.

Felix Lilikis, Administrator, Appellee, v. William F. Bossi, trading as William F. Bossi Contracting Company, and Chicago Consolidated Brewing & Malting Company. Chicago Consolidated Brewing & Malting Company, Appellant.

Gen. No. 22,003. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed May 29, 1917. Rehearing denied June 7, 1917. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Felix Lilikis, administrator of the estate of Kazuny Lilikis, plaintiff, against William F. Bossi, trading as William F. Bossi Contracting Company, a corporation, and Chicago Consolidated Brewing & Malting Company, a corporation, defendants, to recover for the death of plaintiff's intestate. From a judgment for plaintiff for \$6,000 and costs against both defendants jointly, defendant Chicago Consolidated Brewing & Malting Company appeals.

MECHEM, BANGS & HARPER, for appellant.

BENJAMIN B. MORRIS, for appellee.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

1. **MASTER AND SERVANT, § 682***—*when evidence sufficient to show relationship between owner and person repairing building.* In an action for wrongful death through being struck by a piece of wood dropped from a building which was being altered and repaired, evidence *held* to show that the person doing the altering and repairing was a servant of the owner of the building and not an independent contractor.

BARNES, P. J., dissenting.

2. **PRINCIPAL AND AGENT**—*when question as to who person making contract for repair of building is acting for is for jury.* Where the evidence as to whether one making a contract to have a building altered and repaired was acting on behalf of the owner of the building, or of the occupant, or of both, is conflicting, the question is for the jury.

3. **CORPORATIONS, § 516***—*when evidence is sufficient to show identity of.* Where there is evidence that the officers and stockholders of the company owning a building are identical with those of the company occupying it, that the two companies had a similarity of purpose and that the superintendent of the malt house, for which the building was used by the occupant, was paid by the owner and there is no evidence of any lease or other arrangement between the two companies for the occupancy of the building nor of any rent having been paid, a finding of the jury that the two companies were so jointly associated as to constitute but one organization so as to render one liable for the negligence of the other will not be disturbed, even though there was evidence that the occupant had been in possession for upwards of twenty years and the owner had never occupied the premises.

4. **DEATH, § 67***—*when verdict for death is not excessive.* A verdict of \$6,000 for the death of an eleven-year-old girl killed by a piece of wood falling into the street, *held* not excessive, even though she was of foreign parentage and lived in a poor neighborhood.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Michigan Avenue Trust Co. v. Graham, 205 Ill. App. 608.

**Michigan Avenue Trust Company, Defendant in Error,
v. Albert T. Graham et al. Albert T. Graham and
William E. Fuller, Plaintiffs in Error.**

Gen. No. 22,166. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY M. FISHER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and remanded. Opinion filed May 29, 1917.

Statement of the Case.

Action by Michigan Avenue Trust Company, a corporation, plaintiff, against Albert T. Graham, Harry M. Wells, William E. Fuller and James C. Hopkins, defendants, on a contract of guaranty. By direction of the court, the jury found the issues against the defendants and assessed plaintiff's damages at \$10,000. To reverse a judgment for this amount and costs, defendants Graham and Fuller prosecute this writ of error.

JORDAN & LIESSMANN, for plaintiffs in error; ELMER M. LIESSMANN, of counsel.

BENJAMIN LEVERING and ELMER H. HEITMANN, for defendant in error.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

1. TRIAL, § 204*—*when direction of verdict for plaintiff is error.* In an action on a written contract of guaranty, where defendants introduce evidence tending to establish their claim that they had been released from liability thereon, it is error to direct the jury to find for the plaintiff.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Dowsma v. Krueger et al., 205 Ill. App. 609. ^c

2. GUARANTY, § 34*—*when nonpayment of notes need not be proved by plaintiff.* In an action on a written contract of guaranty, where plaintiff's statement of claim alleges the execution and delivery of certain notes to it by the debtor, and that such notes had not been paid, except for certain enumerated payments, and defendants' affidavit of merits makes no defense of payment, plaintiff is not required to prove nonpayment of the notes.

D. B. Dowsma, Defendant in Error, v. Louis C. Krueger, trading as Krueger Brothers, and Carmine Rizzuto. Carmine Rizzuto, Plaintiff in Error.

Gen. No. 22,277. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN R. NEWCOMER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1916. Reversed and remanded. Opinion filed May 29, 1917.

Statement of the Case.

Action by D. B. Dowsma, plaintiff, against Louis C. Krueger, trading as Krueger Brothers, and Carmine Rizzuto, defendants, under Hurd's Rev. St. ch. 82, sec. 28 (J. & A. ¶ 7166), to recover for labor and materials alleged to have been furnished by him as a subcontractor on a building owned by defendant Rizzuto. From a verdict and judgment of \$238 and costs for plaintiff, defendant Rizzuto prosecutes this writ of error.

DE STEFANO & MIRABELLA, for plaintiff in error.

BEAUREGARD F. MOSELEY, for defendant in error.

MR. JUSTICE McDONALD delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.
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D. I. Felsenthal Co. v. Northern Assurance Co., Ltd., 205 Ill. App. 610.

Abstract of the Decision.

1. **MECHANICS' LIENS, § 162***—*what subcontractor suing owner and contractor at law must show.* In an action under the Lien Act (Hurd's Rev. St. ch. 82, sec. 28, J. & A. ¶ 7166), to recover against the owner and contractor jointly for labor and materials furnished as subcontractor, plaintiff must show that he is entitled to a lien on the premises.

2. **MECHANICS' LIENS, § 162***—*what judgment in action at law by subcontractor against contractor and owner must recite.* In an action under the Lien Act (Hurd's Rev. St. ch. 82, sec. 28, J. & A. ¶ 7166), to recover against the owner and contractor jointly for labor and materials furnished as subcontractor, the judgment must recite the date when the lien attached.

D. I. Felsenthal Company for use of Charles R. Carpenter, Appellant, v. Northern Assurance Company, Limited, of London, Appellee.

Gen. No. 22,323. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HOSEA W. WELLS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1916. Affirmed. Opinion filed April 10, 1917. Rehearing denied April 24, 1917. Judgment vacated April 25, 1917, and new opinion filed May 29, 1917.

Statement of the Case.

Action by D. I. Felsenthal Company, a corporation, for the use of Charles R. Carpenter, plaintiff, against the Northern Assurance Company, Limited, of London, defendant, to recover under a fire insurance policy. From a judgment for defendant, plaintiff appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

D. I. Felsenthal Co. v. Northern Assurance Co., Ltd., 205 Ill. App. 610.

BRUNDAGE, LANDON & HOLT and JOHN J. BEILMAN,
for appellant; ROBERT N. HOLT, of counsel.

PADEN & KROPP, for appellee.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 668*—*when evidence is sufficient to show fire to be of incendiary origin.* In an action to recover on a fire insurance policy, evidence held to support a finding that the fire causing the loss was of incendiary origin.

2. CORPORATIONS—*when person holding stock is merely nominal owner.* Where the evidence shows that one received from the principal stockholders of a corporation seventy-five shares of stock therein because of financial aid rendered them and that he took fifty shares in his own name and twenty-five shares in the name of his brother-in-law, and there is no evidence that the brother-in-law ever paid any value for his shares, it is sufficient to show that the latter was merely a nominal owner and that the grantee of the fifty shares was also the real owner of the twenty-five shares.

3. CORPORATIONS, § 155*—*what is effect of failure to transfer shares of stock indorsed in blank on books.* Even though shares which are indorsed in blank and delivered are not transferred on the books of the corporation to the holder, he is the real owner.

4. CORPORATIONS—*when recovery not allowed on contract because of wrongful act of owner of all of stock.* A corporation cannot recover under a fire insurance policy for goods lost through a fire caused by the incendiarism of the real owner of all of the corporate stock.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Edward L. Madden, Administrator of the Estate of
Robert J. Madden, Deceased, Appellee, v. City of
Chicago and Byrne Brothers Dredging & Engineer-
ing Company, Appellants.**

Gen. No. 22,357.

1. JUDGMENT, § 272*—*what is nature of motion for correction of error in fact.* A motion made under Hurd's Rev. St. ch. 110, sec. 89 (J. & A. ¶ 8626), for the correction of an error of fact, is in the nature of a new suit, having for its object the determination of an error of fact *aliunde* the record.

2. APPEAL AND ERROR, § 270*—*when order is interlocutory precluding appeal.* An order allowing a motion to reinstate a case on the trial calendar is interlocutory merely, and no appeal will lie therefrom.

3. APPEAL AND ERROR—*what is a final order.* An order denying a motion to reinstate a case on the trial calendar is final.

4. APPEAL AND ERROR, § 952*—*when bill of exceptions will not be stricken.* A bill of exceptions consisting of a transcript of record of proceedings had on a preliminary hearing on a motion to reinstate the cause, which was granted, will not be stricken on the ground that no appeal was taken from the order allowing the motion.

5. JUDGMENT, § 272*—*what is function of writ of error coram nobis.* The purpose and function of a writ of error *coram nobis* is to provide a remedy by means of which the trial court, after the judgment term, may review and correct errors of fact that do not appear on the face of the record and could not be otherwise corrected.

6. JUDGMENT, § 273*—*what is an error in fact.* Error of the minute clerk, on the preliminary call of the calendar, in improperly noting a case in which plaintiff answered "ready" as stricken from the calendar, is an error of fact and not of law and comes within the provision of Hurd's Rev. St. ch. 110, sec. 89 (J. & A. ¶ 8626), as it does not appear on the face of the record.

7. APPEAL AND ERROR—*when error of clerk in noting case on preliminary call of calendar as stricken is not cured.* Error of the minute clerk in improperly noting a case, on the preliminary call of the calendar, as stricken from the calendar, when, in fact, plaintiff had answered "ready," is not cured by a subsequent gen-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

eral order reinstating all causes stricken from the docket, where plaintiff had no knowledge of the clerk's error.

8. TRIAL, § 21*—*when reinstatement of case stricken from calendar is proper.* Where the minute clerk erroneously notes a case as stricken from the calendar, on the preliminary call of the calendar, though plaintiff answered "ready," a motion to reinstate the case is properly allowed.

9. APPEAL AND ERROR, § 833*—*when bill of exceptions stricken because of insufficiency of nunc pro tunc order for settling and signing by another judge.* Where a *nunc pro tunc* order settling and signing a bill of exceptions which had been presented to another judge than the trial judge is entered after the expiration of the time of filing by such judge, and does not recite statutory facts warranting the presentation of the bill to him nor the grounds for the entry of the *nunc pro tunc* order by him, and there is no showing in the record on which to base the order and the appellee excepted to the *nunc pro tunc* order, though waiving objection to the signature to the bill by such judge instead of the trial judge, the bill will be stricken from the record.

Appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed May 29, 1917. Rehearing denied June 8, 1917.

SAMUEL A. ETTELSON and CHARLES R. FRANCIS, for appellants, City of Chicago; HENRY T. CHACE, JR., of counsel.

HENRY J. & CHARLES AARON, for appellant Byrne Bros. Dredging & Engineering Company; DOUGLAS C. GREGG, of counsel.

QUIN O'BRIEN and WILLIAM B. O'BRIEN, for appellee.

MR. JUSTICE McDONALD delivered the opinion of the court.

Appellee (plaintiff below) recovered a judgment for \$10,000 against the defendants jointly, for wrongfully causing the death of plaintiff's intestate, to reverse which this appeal is prosecuted.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Madden v. City of Chicago et al., 205 Ill. App. 612.

The record filed herein contains two bills of exceptions, one being a transcript of record of the proceedings had on a preliminary hearing on a motion to reinstate the cause, and the other a transcript of subsequent proceedings had at the trial; the former being signed by the trial judge, and the latter by a judge who did not hear the case.

Appellee has entered a motion herein to strike both bills of exceptions from the record and to affirm the judgment, consideration of which was reserved to the hearing.

On July 18, 1914, the said cause was by order of court stricken from the docket. Subsequently, on June 17, 1915, the court entered a general order reinstating all causes stricken from the docket, which included the one at bar. On the following day said cause was placed on the trial call and an order was entered dismissing it for want of prosecution. Appellee, on September 24, 1915, made a motion, supported by affidavit, to vacate the foregoing orders, which were entered, the affidavit recited, because of a mistake or misprision of the minute clerk of the court, who erroneously noted the said case stricken from the docket on July 18, 1914, whereas it should have been marked for trial. Upon a hearing the court entered an order vacating the orders hereinabove referred to and reinstated the cause on the trial calendar.

It is contended by appellee that the first bill of exceptions showing the foregoing proceedings should be stricken from the record for the reason that the filing of said motion was tantamount to the beginning of a new suit in the nature of a writ of error *coram nobis*, and that the said order of reinstatement entered therein was a final order; that no appeal having been taken therefrom, the propriety of the entry of said order cannot be questioned on this appeal.

By section 89, ch. 110, Rev. St. (J. & A. ¶ 8626), the

writ of error *coram nobis* is abolished and all errors of fact committed in the proceedings of any court of record and which by common law could have been corrected by said writ may be corrected by the court in which the error was committed, upon motion in writing made at any time within five years after the rendition of the judgment in the case upon reasonable notice. This motion is in the nature of a new suit, having for its object the determination of an error of fact *aliunde* the record; but the order allowing appellee's motion to reinstate the case on the trial calendar was merely interlocutory, and hence appellants were obliged to wait for a final order from which an appeal or writ of error would lie. Had the motion been denied, however, such an order would of course have been final. (*City of Park Ridge v. Murphy*, 258 Ill. 365; *Cramer v. Illinois Commercial Men's Ass'n*, 260 Ill. 516.) Appellee's motion to strike the first bill of exceptions will therefore be denied.

On the other hand, it is contended by appellants that the court erred in reinstating said cause, for the following reasons, viz.: first, that the court had lost jurisdiction of the case; second, that the error sought to be corrected by appellee's said motion, if any, was one of law and not one of fact; and third, that any error committed by the court in striking said cause from the docket on July 18, 1914, was cured by the general order of June 17, 1915, by which the case was reinstated on the trial calendar.

The purpose and function of the writ of error *coram nobis* is to provide a remedy by means of which the trial court, after the judgment term, may review and correct errors of fact that do not appear on the face of the record and which could not therefore be otherwise corrected. Thus, if proceedings have been had and a judgment rendered against an infant as an adult, or against a dead person as though living, or if error has occurred through the process or through the de-

Madden v. City of Chicago et al., 205 Ill. App. 612.

fault of the clerk, the remedy is by writ of error *coram nobis*. (*LeBourgeoise v. McNamara*, 10 Mo. App. 120; *Teller v. Wetherell*, 6 Mich. 45); and under section 89, *supra*, by written motion to the trial court.

Appellee's motion of September 24, 1915, recited that when the cause was reached on a preliminary call of the calendar on July 18, 1914, counsel for appellee was present in court and responded that he was ready for trial, but that the minute clerk erroneously noted the case as having been stricken from the docket. Such mistake or misprision on the part of the clerk, in our opinion, constituted an error of fact and not of law; and inasmuch as it does not appear on the face of the record, it comes within the provisions of section 89, *supra*. *Teller v. Wetherell, supra*.

Nor was this error cured by the general order of June 17, 1915, reinstating the said cause, for it is clear that had not the said error of fact been committed, the subsequent general order of reinstatement would not have included this case, and counsel for appellee being unaware of the foregoing error, was not chargeable with notice that the general order of reinstatement affected his case. We are of the opinion that, upon the showing made, the cause was properly reinstated by the trial court.

This brings us to a consideration of appellee's motion to strike the second bill of exceptions from the record.

The judgment in question was entered December 18, 1915, by Judge Gibbons, before whom the case was tried. An appeal was prayed and the defendants were allowed ninety days within which to file a bill of exceptions. The time for filing same expired March 17, 1916. The certificate attached to the bill of exceptions recites that it was presented to Judge Mangan on February 25, 1916, and bears his signature. On April 6, 1916, it was again submitted to Judge Mangan, who settled and signed same *nunc pro tunc*, as of February

25, 1916, to which counsel for appellee gave a qualified assent as follows: "Counsel for plaintiff, in open court, assents to the correctness of the bill of exceptions and waives any objection to the signature of Judge Mangan instead of the trial judge. Plaintiff excepts to the *nunc pro tunc* order."

Notwithstanding the foregoing assent on the part of appellee, he urges that there was no basis for the *nunc pro tunc* order to which he saved an exception, and cites the case of *People v. Rosenwald*, 266 Ill. 548, in support thereof. In that case, as in the case at bar, the *nunc pro tunc* order did not recite statutory facts such as the sickness, disability or death of the trial judge, which would warrant the presentation of the bill of exceptions to another than the trial judge. The order now before us does not show affirmatively why Judge Mangan made the entry of presentation of the bill of exceptions to him or why he entered the *nunc pro tunc* order. As there was no showing in the transcript of the record on which to base said order, and as appellee did not assent thereto but excepted to its entry, the *nunc pro tunc* order was, under the authority of the *Rosenwald* case, *supra*, erroneous, and hence the bill of exceptions will be stricken from the record.

Finding no error in the first bill of exceptions or in the common-law record which justified a reversal, the judgment will be affirmed.

Affirmed.

Winn v. Keep, 205 Ill. App. 618.

Ruby L. Winn, Appellee, v. Chauncey Keep et al., Appellants.**Gen. No. 22,372.**

NEGLIGENCE, § 187*—*when evidence insufficient to show that difference in floor levels was proximate cause of injury to person struck by swinging door.* In an action for personal injuries alleged to have been caused by the faulty construction of defendant's building in that the floor level of a room opening on a corridor was seven and one-half inches above the corridor level, whereby plaintiff was injured while passing along the corridor through the violent opening of the room door, the violence of such opening being claimed to have been due to the difference in the floor levels, the evidence examined and held insufficient to show that the difference in the floor levels was the proximate cause of the accident.

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and remanded. Opinion filed May 29, 1917.

H. L. HOWARD, for appellants.

CHARLES C. SPENCER and CHARLES M. HAFT, for appellee.

MR. JUSTICE McDONALD delivered the opinion of the court.

This appeal is prosecuted to reverse a judgment for \$6,500, entered in favor of appellee (plaintiff below), for injuries sustained while in defendants' building.

Plaintiff was employed as a bookkeeper by certain tenants who occupied offices in the Merchants Loan & Trust building in the City of Chicago. At the time of the accident she was going from the office in which she was employed to drop a letter into the mail chute, and, while doing so, she was struck by a door leading to a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

men's toilet, which was suddenly and violently opened by one Greinler, causing the injuries complained of.

The floor of the said men's toilet room was about seven and one-half inches above the level of the corridor through which plaintiff was passing at the time she was struck, and it came up flush with the door, so that when the door was closed the elevation or step could not be seen from either side of the door.

At the close of plaintiff's case, defendants moved the court to direct a verdict in their favor. The court denied said motion, and defendants having elected to stand by it, the cause was submitted to the jury on plaintiff's case alone.

There were six counts in the declaration, but the only negligence charged and relied upon at the hearing was the alleged faulty construction of the building in that the floor level of the men's toilet room was seven and one-half inches higher than the floor level of the corridor. And it is argued that the step in question would cause any one who opened the said door from the inside to lurch forward as he advanced into the corridor, throwing his entire weight against the door and opening it with great force and violence.

Numerous grounds are urged by defendants for a reversal of the judgment, only one of which we deem it necessary to consider, as that is vital to plaintiff's right to a recovery, viz.: Is there any evidence in the record which fairly tends to show that the alleged faulty construction of the building in question was the proximate cause of the injuries to the plaintiff?

The only testimony in the record bearing on this question is that of the plaintiff herself, who testified in part as follows:

"I went down the hall to mail a letter. * * * As I was going to the mail chute, this door violently flew open, striking me on the side and throwing me across the hall, to the other side of the marble hall. * * * This door that flew open is a large, plain, mahogany

door. * * * Up to the time of the accident I did not know what the room was that this door led to. The man that came through the door stood there and looked at me a while after I fell, * * * and then the elevator man took this man that knocked me down, and they both went down. * * * The door struck me right through here (indicating). * * * When a person was on the inside, he can see no step. On the outside you cannot see any step. * * * The door came flush up to the rise. * * * Up to this time I did not know that this man was in the water-closet."

In our opinion, the foregoing testimony fails to prove, either directly or inferentially, that the toilet room step had anything whatever to do with the accident in question. There is no evidence in the record even tending to show that the violent manner in which the said door was opened was in any way attributable to the difference in the floor levels of the corridor and the men's toilet room.

While plaintiff strenuously insists that the violent opening of said door was due to the step from the higher to the lower level, yet such argument is based entirely upon conjecture, for there is no evidence in the record from which such a conclusion might be reasonably drawn. For aught that the record shows, the opening of the door in the manner described may have been due entirely to the negligence of the said Greinler, in which event clearly defendants would not be liable for such misconduct.

Viewing the evidence in a light most favorable to the plaintiff and giving due consideration to all inferences that reasonably flow therefrom, it cannot be said that there is any causal connection shown to have existed between the accident in question and the construction of defendants' building.

The judgment will therefore be reversed; and in order to afford plaintiff an opportunity to make additional proof, if any she has, the cause will be remanded for a new trial.

Reversed and remanded.

**William D. Selvage, by Catherine Selvage, Appellee, v.
Chicago City Railway Company, Appellant.**

Gen. No. 22,393. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTTILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and remanded. Opinion filed May 29, 1917.

Statement of the Case.

Action by William D. Selvage, by his next friend, Catherine Selvage, plaintiff, against the Chicago City Railway Company, defendant, to recover for personal injuries caused by being struck by defendant's street car. From a judgment for plaintiff for \$5,000, defendant appeals.

BUSBY, WEBER & MILLER, FRANKLIN B. HUSSEY and ARTHUR J. DONOVAN, for appellant; JOHN R. GUILLIAMS, of counsel.

A. H. RANES, for appellee.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

STREET RAILROADS, § 144*—*when instruction on exercise of care by person crossing street car track is erroneous.* In an action to recover for personal injuries received through being struck by a street car while crossing a street where there is evidence from which the jury might reasonably have found that plaintiff was negligent in getting into the position in which he was injured, it is error to instruct at plaintiff's request that "plaintiff was only required to use ordinary care. You are further instructed that ordinary care, as defined in these instructions, is that degree of care and caution which a person of the like age, experience and degree of intelligence of the plaintiff, as shown by the evidence, would have exercised under like circumstances and in the situation in which plaintiff was placed, as shown by the evidence."

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kramp v. Thexton, 205 Ill. App. 622.

Michael Kramp, Appellee, v. Louis Thexton, Appellant.

Gen. No. 22,403. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and remanded with directions. Opinion filed May 29, 1917.

Statement of the Case.

Bill by Michael Kramp, complainant, against Louis Thexton, defendant, for the payment of a deficiency decree entered in his favor in a foreclosure proceeding. From an order directing defendant to pay \$4,798.29, defendant appeals. The facts are stated in *Kramp v. Kramp*, 185 Ill. App. 464, and *Kramp v. Thexton*, 201 Ill. App. 508.

WILLARD C. McNITT and JOSEPH A. BATES, for appellant.

HAMLIN & TOPLIFF, for appellee.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

1. MORTGAGES, § 738*—*when owner of equity of redemption entitled to rents, issues and profits during redemption period.* The provision in a trust deed as to the rents, issues and profits collected during the redemption period, which directs the receiver to pay "any rents that may be collected after such sale and before the time of redemption expires, to the purchaser or purchasers of said premises at such sale or sales," does not pledge the rents, issues and profits collected during the period of redemption, but they belong to the owner of the equity of redemption unless he has assumed the indebtedness and there is a deficiency decree against him personally.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

J. J. Badenoch Co. v. Bartnick et al., 205 Ill. App. 623.

2. MORTGAGES, § 635*—*when order directing receiver to recover amount of deficiency decree is vacated by order of vacation.* A decree in foreclosure found that defendant and his codefendant were personally liable for the indebtedness and a deficiency decree was entered against them and the receiver was ordered to remain in possession of the premises during the period of redemption "for the purpose of collecting such deficiency or such part thereof as he may be able to collect." Subsequently the decree was modified by an order vacating the provision finding defendant personally liable. *Held*, that such order of vacation necessarily affected every part of the decree inconsistent therewith respecting the payment of the rents, issues and profits collected during the period of redemption and therefore vacated the order directing the receiver to collect the amount of the deficiency decree.

J. J. Badenoch Company, Appellee, v. Alfred J. Bartnick and Gustav P. Bartnick, Appellants.

Gen. No. 22,406. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and remanded. Opinion filed May 29, 1917.

Statement of the Case.

Assumpsit was brought by J. J. Badenoch Company, a corporation, plaintiff, against Bartnick & Son Company, a corporation, defendant. Thereafter the declaration was amended by adding Alfred J. Bartnick and Gustav P. Bartnick, copartners, as additional defendants, and the original defendant was dismissed from the case. Defendants' pleas were stricken on plaintiff's motion and a default entered against defendants, from a judgment entered on which they appeal.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

J. J. Badenoeh Co. v. Bartnick et al., 205 Ill. App. 623.

BOOZ & STOLL, for appellants.

FRED H. ATWOOD, CHARLES O. LOUCKS and VERNON R. LOUCKS, for appellee.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

1. PLEADING, § 141*—*when affidavit of claim in support of amended declaration is necessary.* Where plaintiff amends his declaration by adding two other defendants and dismisses the original defendant from the case, an affidavit of claim in support of the amended declaration against the added defendants is indispensable to the right of the court to enter judgment without other proof.

2. PLEADING, § 141*—*when contention that plaintiff's claim is not supported by proper affidavit of merits is not waived.* The contention that plaintiff's claim is not supported by a proper affidavit of merits or other competent evidence is not waived by defendants where their affidavits of merits were stricken from the files and judgment was taken against them as by default.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lanward Publishing Company, Appellee, v. National Association of Stationary Engineers of the United States of America, Appellant.

Gen. No. 22,424.

1. **CONTRACTS, § 224***—*how term "due and unpaid" in provision in publishing contract for division of proceeds from sale of space construed.* Where a publishing contract under which the parties are to divide the proceeds from the sale of advertising space provides that on its termination a committee chosen by the parties to adjust the claims and profits arising from and out of any business transactions by the parties, for and in behalf of the publication, which may remain "due and unpaid" at the expiration of the agreement, the term "due and unpaid" includes claims arising out of outstanding unexpired advertising contracts which, at the time of the termination of the publishing contract, were due and unpaid, but not then payable, and cannot be limited to such parts of those contracts as are due and payable at that time, where the latter construction would render ineffective a preceding clause of the publishing contract providing that the outstanding assets shall be distributed equitably between the parties on its termination.

2. **CONTRACTS, § 224***—*what constitute "outstanding assets" within publishing contract for distribution of proceeds on its termination.* In an action to recover on a contract providing for the distribution between the parties of the proceeds of the sale of advertising space in a publication, certain contracts for advertising space outstanding and unexpired at the termination of the publishing contracts, *held* to be jointly owned by the parties to the publishing contract and to constitute "outstanding assets" within the meaning of a provision in the latter contract for the distribution of "outstanding assets" on its termination.

Appeal from the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed May 29, 1917. *Certiorari* denied by Supreme Court (making opinion final).

DUNNE & MURPHY, for appellant; FRANCIS O'SHAUGHNESSY, of counsel.

MOSES, ROSENTHAL & KENNEDY, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lanward P. Co. v. N. A. of S. E. of the U. S. of A., 205 Ill. App. 625.

MR. JUSTICE McDONALD delivered the opinion of the court.

The Lanward Publishing Company (plaintiff below), recovered a judgment against defendant for \$6,039.89 in an action for the reasonable value of certain advertising contracts, to reverse which this appeal is prosecuted.

On January 27, 1904, the parties hereto entered into a written contract by the terms of which plaintiff agreed to publish and distribute monthly to defendant's members a periodical known as the National Engineer, this being the official organ of the defendant association. Plaintiff was to be compensated therefor out of funds derived from the sale of advertising space in said publication, twenty-five per cent. of the gross proceeds of which was to be turned over to the defendant as its share thereof; each party having the right to terminate said contract on December 31, 1909, provided it gave the other one year's notice of its election to do so, in which event the contract provided, "whatever outstanding assets there may be under the control of the parties hereto shall be distributed in an equitable and just manner to the party or parties entitled thereto."

On December 15, 1908, defendant notified plaintiff of its election to abrogate said contract effective December 31, 1909, and subsequently placed the publication of the National Engineer in other hands. When the publishing agreement came to a close, it was found that a great number of the advertising contracts procured by plaintiff were still in force.

The question presented for determination on this appeal is, Do the advertising contracts just referred to constitute part of the "outstanding assets" within the meaning of the aforementioned provision of the publishing contract?

Defendant contends that the term "outstanding assets" does not include the advertising contracts in

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question, and in support thereof directs our attention to the following clause in the publishing contract, which it contends limits and defines the term "outstanding assets:"

"It is further agreed by the said parties of the said first and second part that a committee of two be chosen by each of the parties herein, to adjust all claims and profits arising from and out of any business transactions by the parties herein, for and in behalf of said publication, which may remain due and unpaid at the expiration of this agreement."

It is argued that the terms "outstanding assets * * * to be distributed," and "claims and profits * * * due and unpaid" refer to and include precisely the same subject-matter, and that the latter expressly limits the adjustment to be made by the committee thereinabove provided for, to "claims and profits * * * which may remain due and unpaid at the expiration of this (the publishing) agreement." Underlying this contention is the theory of defendant, that the unexpired portions of these advertising contracts were neither claims or profits due, nor claims or profits unpaid. Obviously defendant construes the term "due and unpaid" to mean due and payable.

The legal meaning of the term "due," as defined by the Century Dictionary, is: "Owing, irrespective of whether the time of payment has arrived; presently payable; already matured." It will therefore be seen that the expression "due and unpaid" does not necessarily mean due and payable. To so restrict its meaning would be to render nugatory the preceding clause of the publishing contract so far as it relates to outstanding assets not payable at the time of the termination of the publishing contract. Such a construction would militate against the well-settled rule that a contract should be construed as a whole and effect given to every part thereof if possible. Applying this rule to the contract now under consideration, we are im-

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pelled to the conclusion that the term "due and unpaid," as hereinabove used, refers to the claims arising out of the outstanding unexpired advertising contracts in question which at the time of the termination of the publishing contract were due and unpaid, but not then payable.

There can be no question that during the life of the said publishing contract plaintiff had an interest in the moneys realized from the publication of advertisements thereunder. Clearly, therefore, the advertising contracts were assets; and if they were assets during the life of the publishing agreement, they were not transmuted by its cancellation. Nor does defendant suggest any other classification for them.

Both defendant and plaintiff lay claim of exclusive ownership to these contracts, and our attention is directed to various circumstances which each considers as tending to bear out its assertion.

In our opinion, neither party had the sole ownership of these contracts to the exclusion of the other, but both jointly owned and had control of them. They therefore constituted "outstanding assets * * * under the control of the parties hereto."

The court therefore properly entered the judgment complained of.

Finding no reversible error in the record, the judgment will be affirmed.

Affirmed.

Charles Busack, Appellee, v. Chicago City Railway Company, Appellant.**Gen. No. 22,465. (Not to be reported in full.)**

Appeal from the Circuit Court of Cook county; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed May 29, 1917.

Statement of the Case.

Action by Charles Busack, plaintiff, against the Chicago City Railway Company, defendant, to recover for personal injuries received while a passenger on one of its cars. There was a verdict and judgment for plaintiff for \$4,750 and costs, from which defendant appeals.

BUSBY, WEBER & MILLER, BENJAMIN F. RICHOLSON and ARTHUR J. DONOVAN, for appellant; JOHN R. GUILLIAMS, of counsel.

JAMES C. McSHANE, for appellee.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

1. CARRIERS, § 278*—*what care required towards passenger.* In an action against a carrier for personal injuries, an averment in the declaration that at the time of the accident plaintiff was a passenger on defendant's car implies a duty on defendant's part to exercise towards plaintiff the highest degree of care reasonably consistent with the means of conveyance employed and the practical operation of its line, which duty continues until the passenger has had a reasonable opportunity to alight safely.

2. CARRIERS, § 476*—*when custom as to keeping of exit door*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Busack v. Chicago City Railway Co., 205 Ill. App. 629.

latched while car is moving need not be alleged or proved. In an action by a passenger against a street railway company to recover for injuries alleged to have been received in alighting from a moving car through the negligence of the motorman in unlatching while the car was moving, an exit door which was customarily kept latched until the car stopped, in order to show actionable negligence on defendant's part it was not necessary that plaintiff should aver the custom as to the operation of the exit doors on defendant's cars, nor that, having averred it, he should prove it, but it is sufficient if from the evidence it can be reasonably said that plaintiff was warranted in assuming that the unlatching of the door amounted to an invitation to plaintiff to alight, irrespective of the existence of any custom as to unlatching the door.

3. CARRIERS, § 4*—*when evidence as to custom of keeping exit door latched until stopping of car is admissible.* In an action by a passenger against a street railway company to recover for injuries alleged to have been received in alighting from a moving car through the negligence of the motorman in unlatching, while the car was moving, an exit door which was customarily kept latched until the car stopped, competent evidence as to the existence or non-existence of the custom is admissible and material as bearing on the question as to whether plaintiff was in the exercise of due care at and just before the time of the accident.

4. CARRIERS, § 480*—*when negligence of motorman in unlatching exit door while car is still moving is question for jury.* In an action by a passenger against a street railway company to recover for injuries alleged to have been received in alighting from a moving car through the motorman's negligence in unlatching at night and while the car was moving, an exit door which was customarily kept latched until the car stopped, where there is a conflict in the evidence as to whether or not the motorman's act was negligence, the question is for the jury.

5. CARRIERS, § 480*—*when contributory negligence of passenger in opening unlatched exit door while car is moving and alighting is question for jury.* In an action by a passenger to recover for injuries alleged to have been received in alighting from a moving car through the motorman's negligence in unlatching at night and while the car was moving, an exit door which was customarily kept latched until the car stopped, where the evidence as to whether or not the plaintiff was guilty of contributory negligence in opening the door and alighting is conflicting, the question of his negligence is for the jury.

6. CARRIERS, § 464*—*what evidence material upon proximate cause of injury to passenger alighting from moving car at night.*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

In an action by a passenger to recover for injuries alleged to have been received in alighting from a moving car at night, through the motorman's negligence in unlatching, while the car was moving, an exit door which was customarily kept latched until the car stopped, evidence that the motorman turned around and looked at plaintiff when he unlatched the door; that, although he saw plaintiff open the door to alight, he did not warn him; that the immediate environment was dark and plaintiff could not, therefore, see the street pavement; that plaintiff had observed that the defendant's motormen did not unlatch the exit doors until the cars had stopped is material upon the question of the proximate cause of the injury.

7. DAMAGES, § 191*—*when question as to what caused resulting injury to hand is for jury.* In an action to recover for personal injuries received by alighting from a moving street car, where, though there is no positive testimony that the use of plaintiff's left hand was impaired as a result of the fracture of his collar bone caused by the fall, an expert testifies that, in his opinion, the crippled condition of the hand is permanent and probably resulted from an abscess which he found in the left arm pit, and the evidence shows that plaintiff had to undergo an operation on his collar bone immediately after the accident, following which the abscess formed, and that shortly thereafter plaintiff discovered that the fingers of his left hand resisted a firm closure, and he testifies that before the injury he had never had any trouble with his shoulder or arm and had always had full use of his left hand, the question as to what caused the disability of his hand is properly submitted to the jury as one of fact.

8. DAMAGES, § 120*—*when verdict for personal injuries is not excessive.* In an action for personal injuries, a verdict for \$4,750 is not excessive where it appears that plaintiff fractured his collar bone and was totally incapacitated for about seven months, that he was subsequently unable to follow his trade as a carpenter, owing to his inability to close his hand as a result of the injury, and was obliged to accept other employment at a reduced salary, though it appeared that for a time before the injury he had temporarily done other than carpenter work, owing to a scarcity of work, at a lower figure than that paid carpenters, where it appears that when he received the injury he was again working as a carpenter.

9. CARRIERS, § 482*—*when instruction is not erroneous as limiting passenger's exercise of care to time of accident.* In an action by a passenger to recover for personal injuries received in alighting from a moving street car, an instruction that if the jury believed from the evidence that plaintiff was injured while in the exercise

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Hill, 205 Ill. App. 632.

of ordinary care for his own safety, provided they believed he was blameless of any contributory negligence, and that he was injured as a result of negligence on the part of defendant as charged in the declaration, they should find for the plaintiff, is not misleading as limiting plaintiff's exercise of care to the time of the happening of the accident, as the words "while in the exercise of ordinary care" are sufficiently comprehensive to include the time just preceding the accident.

**The People of the State of Illinois, Defendant in Error,
v. Harry Hill, Plaintiff in Error.**

Gen. No. 22,562. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN R. CAV-
ERLY, Judge, presiding. Heard in the Branch Appellate Court at
the October term, 1916. Reversed. Opinion filed May 29, 1917.

Statement of the Case.

Prosecution by the People of the State of Illinois,
against Harry Hill, for vagrancy. To reverse a judg-
ment of guilty, under which he was sentenced to serve
six months in the house of correction, defendant prose-
cutes this writ of error.

JOHN M. LONERGAN, for plaintiff in error.

MACLAY HOYNE, for defendant in error.

MR. JUSTICE McDONALD delivered the opinion of the
court.

Abstract of the Decision.

1. VAGRANCY, § 1*—*when judgment of guilty reversed.* On a
prosecution for vagrancy, where there is a total lack of evidence

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same
topic and section number.

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to prove that defendant was without lawful means of support at and before the time of his conviction, and defendant testifies, and his evidence is corroborated by testimony of his employer, that for several weeks prior to his arrest he was lawfully employed and receiving a salary of twenty dollars a week, a judgment of guilty will be reversed.

2. VAGRANCY, § 2*—*what is essential to establish offense of.* To establish the offense of vagrancy affirmative proof that defendant was without lawful means of support is indispensable.

John C. Gifford, Appellant, v. Smith H. Bracey, Appellee.

Gen. No. 22,328. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. ANDREW D. WEBB, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed May 29, 1917. Rehearing denied June 11, 1917.

Statement of the Case.

Action by John C. Gifford, plaintiff, against Smith H. Bracey, defendant, to recover on a contract for the purchase of a bond. From a judgment for defendant, plaintiff appeals.

MILLER, STARR, BROWN, PACKARD & PECKHAM, for appellant.

F. L. SALISBURY and M. MARSO, for appellee.

MR. JUSTICE MCGOORTY delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Gifford v. Bracey, 205 Ill. App. 633.

Abstract of the Decision.

1. SALES, § 323*—*what constitutes variance where performance pleaded.* In an action to recover on a contract by defendant to purchase a bond, where plaintiff pleads performance, he must prove performance as alleged and cannot recover on a waiver of performance.

2. SALES, § 323*—*when waiver of performance must be pleaded.* Waiver of performance of a contract must be pleaded, when relied upon in an action to recover on a contract of sale.

3. SALES, § 329*—*when evidence is insufficient to show performance of contract for sale of bond.* In an action to recover on a contract for the purchase of a bond in which the plaintiff pleads performance, where the evidence shows neither an actual offer by plaintiff to make delivery of the bond to defendant nor to leave it in defendant's possession, but shows that plaintiff retained it and did not make a formal tender of it until after he had commenced suit, performance is not shown.

4. SALES, § 325*—*when burden of proof is on plaintiff.* In an action on a contract for the purchase of a bond, the burden is on the plaintiff alleging performance to prove performance on his part.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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